

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MASS ENGINEERED DESIGN, INC. * Civil Docket No.
* 2:06-CV-272
VS. * Marshall, Texas
*
* November 19, 2008
ERGOTRON INC., ET AL * 8:30 A.M.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE LEONARD DAVIS
UNITED STATES DISTRICT JUDGE
AND A JURY

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(Proceedings recorded by mechanical stenography,
transcript produced on CAT system.)

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* * * * *

P R O C E E D I N G S

(Jury out.)

COURT SECURITY OFFICER: All rise.

THE COURT: Please be seated.

All right. Counsel, if you would, sort
of inform me where we are and what we still have left to
cover.

1 MR. NIEDERLUECKE: Your Honor, from
2 Ergotron's presentation, we're on Jerry Moscovitch.
3 We'll hopefully, finish very shortly with his testimony.

4 Then it's down to our list of deposition
5 testimony. We have it in written form for Mirek Waraksa
6 and Mark Elchuk. We don't have videos for those.

7 And then we have two very, very short --
8 literally a few lines from Sean Roarty and Ed Duffy just
9 relating to evidentiary laches issues, and then one
10 video of Alan Tameshtit.

11 THE COURT: And what kind of total time
12 are we looking at there; do you know?

13 MR. NIEDERLUECKE: If you -- it depends
14 on if you want us to read in Waraksa or Elchuk or just
15 submit those to the Court.

16 THE COURT: How long are those?

17 MR. NIEDERLUECKE: If they're read in,
18 they're probably, I would guess, 15 to 20 minutes each,
19 if they're read in. But we also have highlighted
20 copies, if you would rather just take the excerpt.

21 THE COURT: We'll see -- we'll see where
22 we are. I might have you just summarize them for them
23 and then submit a written copy.

24 MR. NIEDERLUECKE: Okay. And Waraksa is
25 1 minute -- about 14 minutes total for Tameshtit.

1 THE COURT: Let me interrupt you for just
2 a second. I have a note from the jury that they said
3 that they need a calculator. Any objection to me
4 sending a calculator in?

5 MR. TRIBBLE: None from Plaintiff, Your
6 Honor.

7 MR. TYLER: No objection, Your Honor.

8 THE COURT: All right. Do we have a
9 calculator we can --

10 MR. TRIBBLE: We have one.

11 THE COURT: Yeah, we've got one here.

12 All right. I'm just going to send that
13 in without a note, without a note response.

14 Ms. Ferguson, here's their note.

15 COURTROOM DEPUTY: Thank you, Judge.

16 THE COURT: How long do you think total?

17 MR. NIEDERLUECKE: If I add it up here,
18 Your Honor, without the Waraksa and Elchuk, it's about
19 35 minutes worth of time, and we put them for 20 minutes
20 each. It would be a little over -- I would guess we're
21 going to be a little over an hour, hour and ten minutes
22 at most.

23 THE COURT: Okay. And what about
24 cross-examination of any of those?

25 MR. TRIBBLE: We have -- for Waraksa,

1 it's about 8 minutes, 30, because we do have a video of
2 our part that we would like the Court to view. And we
3 have two and a half minutes on Elchuk, and I think -- so
4 far I think the cross on Jerry is about 30 minutes.
5 And then are you calling other videos?

6 MR. REED: We do have additional videos,
7 Your Honor. They all total a little less than 20
8 minutes.

9 MR. TRIBBLE: Okay. And so our counter
10 for one of those is 40 seconds.

11 THE COURT: Okay. All right. So we're
12 looking at probably a little over an hour to deal with
13 Ergotron's direct and cross probably?

14 MR. NIEDERLUECKE: Yes. And then Dell
15 has about 20 minutes.

16 THE COURT: All right. Is that all Dell
17 has, is just 20 minutes?

18 MR. TYLER: Yes, Your Honor.

19 THE COURT: Do you have anything in
20 response to that?

21 MR. TRIBBLE: Our cross -- or redirect, I
22 guess, of Mr. Moscovitch is about 30 minutes.

23 THE COURT: Okay. All right. Well, one
24 of the reasons I asked -- of course, we don't know what
25 the jury will do or how long they will be, but I have

1 some other matters scheduled at 1:00 in Tyler this
2 afternoon.

3 So it looks like we'll be able to finish
4 with this testimony, and I can hear that. And then I
5 wanted to ask, if the jury's not back, if either side
6 objects to Magistrate Judge Everingham receiving the
7 verdict if it comes in after 1:00 o'clock or after noon.

8 MR. TYLER: No objection.

9 MR. NIEDERLUECKE: No objection.

10 MR. TRIBBLE: No objection.

11 THE COURT: All right. Very good.

12 All right. You may proceed with your
13 testimony.

14 JERRY MOSCOVITCH, DEFENDANT'S WITNESS, PREVIOUSLY SWORN

15 CROSS EXAMINATION (CONTINUED)

16 BY MR. NIEDERLUECKE:

17 Q. Good morning, Mr. Moscovitch.

18 A. Good morning.

19 MR. NIEDERLUECKE: Oh, before we start,
20 Your Honor, may I provide the list of exhibits that will
21 be -- I'd like to have admitted? Your Honor, can I list
22 off my exhibits?

23 THE COURT: Yes. Uh-huh.

24 MR. NIEDERLUECKE: Thank you.

25 Defendants offer Defendant's Exhibits 1375, 120, 145,

1 1072, 1074, 1076, 162 --

2 THE COURT: Little bit slower. Okay.

3 MR. NIEDERLUECKE: -- 1125, 1126, 1127,
4 1128, 1056, 1251, 1132, 1133, 1225, 1378, 87, 1033,
5 1038, 1060, and then Plaintiff's Exhibit 1188.

6 THE COURT: Okay. Any objection?

7 MR. NELSON: No, Your Honor.

8 THE COURT: Be admitted.

9 MR. NELSON: We just have a couple more
10 that have already been admitted.

11 THE COURT: All right.

12 MR. NELSON: And that's Plaintiff's
13 Exhibit 393, Plaintiff's Exhibit 405, PX1180, PX398,
14 PX395, DX1225, and DX1172.

15 THE COURT: Any objection?

16 MR. NIEDERLUECKE: No objection, Your
17 Honor.

18 THE COURT: Be admitted.

19 All right. You may proceed.

20 MR. NIEDERLUECKE: Thank you.

21 Q. (By Mr. Niederluecke) Mr. Moscovitch, it is
22 your belief that you should rely on the experts to
23 determine what is prior art; isn't that correct?

24 A. Well, I use my lawyers to communicate with
25 the Patent Office, yeah.

1 Q. And you rely on those lawyers to determine
2 what is prior art; isn't that correct?

3 A. Yes. Right.

4 Q. But you didn't consult with either of your
5 patent attorneys, Mr. Waraksa or Mr. Elchuk, to
6 determine whether the E-Book should be disclosed to the
7 Patent Office, did you?

8 A. Well --

9 Q. It's a yes-or-no question.

10 A. No, I did not.

11 Q. Thank you.

12 So you made the decision on your own -- you
13 made the decision on your own not to disclose the E-Book
14 to the Patent Office; isn't that correct?

15 A. No. I never even thought about the E-Book at
16 all.

17 Q. So you're saying -- so you're saying you
18 never made any decision whatsoever?

19 A. It never even occurred to me to consider the
20 E-Book. It was an R&D project. It was not a product,
21 wasn't a patent. And at the time, I was working on
22 probably six designs, and I was supplying product to
23 Bloomberg. So I had a 55-person company that I was
24 running.

25 MR. NIEDERLUECKE: Can you pull up

1 Defendant's Exhibit 1375, please?

2 Q. (By Mr. Niederluecke) We talked a little bit
3 about this yesterday, Mr. Moscovitch. This is your
4 declaration to the Patent Office regarding the '978
5 Reissue Patent; is that correct?

6 A. Yes, that's correct.

7 MR. NIEDERLUECKE: And if we go -- go a
8 couple of pages in, please. Two more pages in. Let's
9 keep going. I want to go to Paragraph 12, if I can.

10 Thank you. Can you bring up Paragraph
11 12?

12 Q. (By Mr. Niederluecke) Now, in Paragraph 12,
13 you told the Patent Office that you and Mr. Waraksa had
14 reviewed patents, didn't you?

15 A. Yes, that's correct.

16 Q. But you and Mr. Waraksa didn't review any
17 patents, did you?

18 A. We did. During the prosecution of the '939
19 patent, the Patent Office sent him three patents.

20 Q. Mr. Waraksa -- Mr. Moscovitch -- excuse me --
21 you were deposed on May 23rd of this year, weren't you?

22 A. Yes, that's correct.

23 Q. And on May 23rd, you were asked --

24 MR. NIEDERLUECKE: As soon as I can get
25 it up here. Sorry. Page 352.

1 Q. (By Mr. Niederluecke) Is it correct that on
2 May 23rd, in your deposition, I asked you: In fact, you
3 and Mr. Waraksa didn't review any patents, did you?
4 Is that what I asked you?

5 A. That's what you asked me here.

6 Q. And your response was: Not to my
7 recollection; isn't that correct?

8 A. Well, I'm not sure --

9 Q. Is that your response?

10 A. Well, I'm not sure what you're asking here.

11 Q. I'm asking --

12 A. During the application, we didn't review any
13 patents.

14 Q. Mr. Moscovitch, would you -- I asked you: In
15 fact, you and Mr. Waraksa didn't review any patents, did
16 you; is that correct?

17 Is that what I asked?

18 A. That's what you asked, yes.

19 Q. And please read your answer.

20 A. Not to my recollection.

21 Q. And then I asked you: So that statement is
22 wrong?

23 And what did you answer?

24 A. Oh, I recollect what this is now. You're
25 referring --

1 Q. I'm sorry, Mr. Moscovitch. I'm asking the
2 questions right now, and I'd like you to answer my
3 question.

4 A. Well --

5 Q. Okay. I'm just simply asking you to read
6 from the deposition. Your attorneys -- your attorneys
7 will have a chance to elicit your explanation.

8 A. It possibly could be.

9 Q. Okay. So let me do it again so we're clear.
10 I asked you: So that statement is wrong?

11 And what did you respond?

12 A. It possibly could be.

13 Q. Thank you.

14 MR. NELSON: Your Honor?

15 THE COURT: Yes.

16 MR. NELSON: There was -- there's six
17 days of Mr. Moscovitch's deposition here. Can I read an
18 excerpt that goes directly to this issue that speaks to
19 this?

20 THE COURT: Yes, you may.

21 MR. NIEDERLUECKE: What day? What day?

22 MR. NELSON: October 19th, the very first
23 deposition of Mr. Moscovitch, Page 242, Line 3.

24 QUESTION: When you referred in your
25 reissue declaration to the prior art and the patents

1 that you reviewed, what was the scope of that prior art
2 and patents that you were referring to when you asked --
3 when we asked you that question?

4 ANSWER: That I reviewed?

5 QUESTION: Yeah.

6 ANSWER: It would be the three patents
7 that we discussed that were cited in the '939 patent.

8 QUESTION: And also the CRT?

9 ANSWER: CRTs, those prior art.

10 THE COURT: All right. You may proceed.

11 Q. (By Mr. Niederluecke) Mr. Moscovitch, your
12 statement to the Patent Office that you and Mr. Waraksa
13 reviewed patents was wrong, wasn't it?

14 A. During the reissue patent?

15 Q. Your statement in your declaration, yes, to
16 the -- in the reissue patent prosecution that you and
17 Mr. Waraksa had reviewed patents was wrong, wasn't it?

18 A. No, it wasn't.

19 Q. In fact, Mr. Waraksa (sic), you have no
20 explanation for that statement you made to the Patent
21 Office, do you?

22 A. Excuse me. My name is Mr. Moscovitch.

23 Q. I'm sorry. I am horrible with names.

24 Mr. Moscovitch --

25 A. Yes.

1 Q. -- you have no explanation for that statement
2 you made to the Patent Office; isn't that correct?

3 A. Which statement are you referring to?

4 Q. The statement -- the statement where you
5 stated that you and Mr. Waraksa had reviewed patents.

6 A. We had reviewed patents. We reviewed the
7 three patents that the Patent Office cited in the
8 prosecution of the '939 patent.

9 Q. Mr. Moscovitch, on May 23rd, in your
10 deposition --

11 MR. TRIBBLE: Page?

12 MR. NIEDERLUECKE: I apologize. Page
13 353.

14 Q. (By Mr. Niederluecke) I asked you: Why did
15 you tell the Patent Office that you and Mr. Waraksa had
16 reviewed prior art patents when, in fact, you hadn't?
17 And what did you respond?

18 A. What it says here is: I suppose this may be
19 an error.

20 Q. And so then I followed up and asked you: So
21 as we stand here today, you have no explanation for your
22 statement to the Patent Office in that regard?
23 And what did you respond?

24 A. On this page here, I said, I do not.

25 Q. Mr. Moscovitch, isn't it true that you didn't

1 see the '170 patent until 2007?

2 A. Yes, that's correct.

3 Q. So you certainly hadn't reviewed the '170
4 patent with Mr. Waraksa, correct?

5 A. Not the '170 patent, that's correct.

6 Q. And just to make sure I'm straight here from
7 yesterday, the '170 patent shows booking of only one
8 screen, not two, correct?

9 A. Actually, in Figure 3 of the '170 patent, it
10 shows booking of two screens.

11 MR. NIEDERLUECKE: If we can, Counsel,
12 I'm going to the 10/19/07 deposition, Page 243.

13 MR. TRIBBLE: Page?

14 MR. NIEDERLUECKE: Page 243.

15 Q. (By Mr. Niederluecke) Mr. Moscovitch, do you
16 remember, October of 2007, being deposed in this case?

17 A. I do.

18 Q. And you were deposed in this case as a
19 corporate representative of Mass; is that correct?

20 A. Yes.

21 Q. And is it correct that you were asked by your
22 own attorney, Mr. Nelson: Do you think that this patent
23 shows booking as you just defined it?

24 And what was your answer?

25 A. It says here, No, I don't, but I was

1 referring to Figure 1.

2 Q. Where does it -- show me in the questioning
3 here where -- where it says you were referring to
4 Exhibit 1 (sic)?

5 A. Well, right here in No. 19, it says: This
6 patent shows booking of one screen which moves, and the
7 other screen remains stationary.

8 So for that particular figure, you're moving
9 the one screen with respect to a CRT. In Figure 3,
10 there's a double hinge there which you can attach to a
11 notebook, and that allows both screens to book.

12 Q. In fact, you said, this patent shows booking
13 of only one screen which moves, and the other screen
14 remains stationary, didn't you?

15 A. That's what I said here, yeah.

16 Q. Now, Mr. Moscovitch, you became aware of
17 Ergotron in 1999; isn't that correct?

18 A. I don't recall when I became aware of them.
19 Possibly at the ComDex show in 1999.

20 Q. And by -- by June of 2000, you were aware
21 that most of the competing products that were on the
22 market were going to infringe on the '978 patent; isn't
23 that correct?

24 A. I'm not sure which products you're referring
25 to.

1 Q. Well, I'm referring to most of the competing
2 products, Mr. Moscovitch. Is that a correct statement?

3 A. I don't know which products were out there.
4 Certainly, Ergotron was out there.

5 Q. And you were aware, by June of 2000, of
6 Ergotron's DS 100 product, right?

7 A. Yes, correct.

8 Q. And, in fact, by June of 2000, you claimed to
9 have a legal opinion that most competitive products
10 would infringe on the '978 patent; isn't that correct?

11 A. If you could -- if you could show me a
12 document.

13 MR. NIEDERLUECKE: Can you pull up DX120?

14 Q. (By Mr. Niederluecke) You did a proposal to
15 Richardson Electronics, correct?

16 A. Yes, I did.

17 Q. And is that that proposal?

18 A. Yes, correct.

19 Q. Defendant's Exhibit 120?

20 MR. NIEDERLUECKE: And let's go to Page
21 10 of that proposal.

22 Q. (By Mr. Niederluecke) Now, Mr. Moscovitch, by
23 June of 2000, you had gotten your notice of allowance on
24 the '978 patent, hadn't you?

25 A. By June of 2000? I believe so.

1 Q. Okay. So you knew you were -- you knew what
2 claims you were going to get, correct?

3 A. Yes.

4 MR. NIEDERLUECKE: Can you just pull up
5 generally that whole page, make it bigger for us?

6 There.

7 Q. (By Mr. Niederluecke) And as you see, in that
8 first full paragraph, this was a proposal to a potential
9 client, correct?

10 A. Partner. Potential partner.

11 Q. A potential business partner of yours.

12 A. Yes.

13 Q. And you told that business partner that you
14 had legal opinions that indicated that most of the
15 competitive products infringed on your patents; is that
16 right?

17 A. That's what it says here, yes.

18 Q. And one of those patents you're -- you're
19 referring to was the soon-to-be-issued '978 patent;
20 isn't that correct?

21 A. Yes.

22 Q. And did you, in fact, have a legal opinion in
23 June of 2000 to that -- to that effect?

24 A. Well, I had talked with Mark Elchuk, my
25 patent attorney --

1 Q. Okay. And --

2 A. -- and his opinion was that --

3 MR. NELSON: Hold on.

4 Your Honor --

5 MR. NIEDERLUECKE: He doesn't have to
6 disclose this. Just the fact that he had it, and that's
7 what I was going to -- waiting for you to stop the
8 witness if you wanted to.

9 Q. (By Mr. Niederluecke) Now, you didn't sue
10 Ergotron in 2001 because you wanted to build a
11 relationship with Dell; isn't that right?

12 A. That's correct. That was my goal.

13 Q. You wanted to try to build a business; isn't
14 that right?

15 A. Yes.

16 Q. In fact, your strategy was to not sue
17 Ergotron in 2001; isn't that correct?

18 A. Well, my strategy was not to get involved in
19 lawsuits. That was -- that wasn't something that I
20 wanted to do.

21 Q. But you could appreciate that since you
22 didn't sue Ergotron in 2001, Ergotron was going to
23 concentrate on growing its multidisplay business; isn't
24 that right?

25 A. Well, I don't know that, but I know -- excuse

1 me -- in the case of other companies that have been
2 involved, they have approached me, and we've talked
3 about working together. So we never heard from
4 Ergotron.

5 Q. What other companies are you referring to,
6 Mr. Moscovitch?

7 A. Well, Peerless for one.

8 Q. And Peerless came to you because you -- you
9 alleged that their products infringed in this case,
10 didn't you -- didn't they?

11 A. That's correct.

12 Q. And, in fact, the deal you did with
13 Peerless -- is that right -- the 60,000-unit order?

14 A. Correct.

15 Q. Okay. That came about as a result of you
16 alleging their products infringed, correct?

17 A. No. That came about as a result of a
18 business meeting.

19 Q. A business meeting that occurred after they
20 were -- settled out in this case?

21 A. Yes. But they came to see me in Toronto.

22 Q. Were they required to do that under their
23 settlement?

24 A. I asked for a business meeting, but they --
25 they were very interested in doing that, and they

1 were -- they pushed for that.

2 Q. Now, Mr. Moscovitch, I want to go back to
3 your earlier statement about Ergotron growing its
4 business, and I want to compare that to what you said in
5 your deposition.

6 Do you see at the bottom --

7 MR. NIEDERLUECKE: Page 517 of the May
8 23rd deposition, Counsel. Page -- so 517, starting at
9 Line 22.

10 Q. (By Mr. Niederluecke) Do you see I asked you:
11 Do you understand that just like you were doing
12 throughout the -- 2000 in trying to grow your business,
13 certainly, Ergotron was going to concentrate on trying
14 to grow its multidisplay business?

15 Do you see that?

16 MR. NELSON: I'm sorry, Kurt. Which day?

17 MR. NIEDERLUECKE: Oh, May 23rd.

18 Q. (By Mr. Niederluecke) Do you see that
19 question, Mr. Moscovitch?

20 A. Yes, I see that, but I also --

21 Q. And what was your answer?

22 A. I understand that they would want to do that.

23 Q. I'm sorry. Just -- if you could read your
24 answer to my question on Line 2.

25 A. I can appreciate what?

1 Q. Do you think you actually probably said, I
2 can appreciate that?

3 A. Probably.

4 MR. NELSON: Can we read the very next
5 question and answer?

6 THE COURT: Yes, you may.

7 MR. NELSON: Question from
8 Mr. Niederluecke: So in 2000 -- 2001, you understood
9 that every year you waited to see Ergotron was another
10 year that they would be investing to expand their own
11 business, right?

12 ANSWER: Well, if we informed Ergotron
13 that they were infringing, I would think the right thing
14 to do would be to come and see us, talk to us. Let's
15 talk about it. Let's see what's possible. We never
16 heard from them.

17 Q. (By Mr. Niederluecke) And, in fact, as you
18 said in front of the jury, you never even picked up the
19 phone and called Ergotron, did you?

20 A. I -- I didn't think it was my position to
21 call them. I thought it was their position to call me.

22 Q. But even though you didn't call them, you
23 continued to keep an eye on them, didn't you?

24 A. I'm not sure what you mean by keep an eye on
25 them.

1 Q. Well, you certainly kept track of their
2 products, right?

3 A. Not in great detail. I mean, I knew
4 something about what they were doing.

5 MR. NIEDERLUECKE: Can we pull up
6 Plaintiff's Exhibit 1188, please? 1188.

7 Q. (By Mr. Niederluecke) In fact, you sent
8 your -- your salespeople to -- to shows to take pictures
9 of Ergotron's products, didn't you?

10 A. I don't know that, but if you have a
11 document, then...

12 Q. In fact, when it comes up here, we'll see it,
13 but in July of 2001 --

14 MR. NIEDERLUECKE: Let's focus on the
15 bottom half of that, if we can.

16 Q. (By Mr. Niederluecke) This is a -- the bottom
17 half is an e-mail from Eric Stageman to you, correct?

18 A. Yes.

19 Q. And what position did Eric have at Mass?

20 A. Director of sales.

21 Q. And the subject line is Ergotron, isn't it?

22 A. Yes.

23 Q. So this is -- this is July 27th of 2001. Do
24 you see that date?

25 A. Yes.

1 Q. So that's about -- that's over a month after
2 you received Ergotron's letter back to you, correct?

3 A. Yes.

4 Q. Okay. And -- and Mr. Stageman is sending you
5 photos from a trade show; is that correct?

6 A. Yes, I believe so.

7 Q. Okay.

8 MR. NIEDERLUECKE: Let's go to the next
9 page, if we can.

10 And the next page. Sorry.

11 Q. (By Mr. Niederluecke) And they're not very
12 clear here, but these are photos of Ergotron's products
13 that Mr. Stageman took, aren't they?

14 A. Yes, in a booth. That's a photograph of
15 their booth.

16 MR. NIEDERLUECKE: And let's go back to
17 the first page, if we can.

18 And if we can highlight the top half of
19 this e-mail now -- or bring it -- actually, blow it up,
20 if you would, the top half of the e-mail, so we can read
21 it.

22 Q. (By Mr. Niederluecke) And in March of 2003,
23 you forwarded these to someone, didn't you?

24 A. Yes.

25 Q. You forwarded the e-mail, along with the

1 photos, correct?

2 A. Yes. I forwarded that to Artemia because
3 they were working with a patent lawyer in San Francisco,
4 and they were going to see if they could do something
5 for me.

6 Q. And who is Artemia?

7 A. It's a marketing group based in San
8 Francisco.

9 Q. And they were working with a patent lawyer?

10 A. They worked with a lawyer, and we were
11 talking about raising money and the issues we had in the
12 patent infringement.

13 Q. And -- and that wasn't your lawyer, right?

14 A. No, that wasn't my lawyer at the time, but
15 that's the lawyer that I was part of their team.

16 Q. Do you know who that lawyer was?

17 A. I can't remember his name.

18 Q. Was it -- what -- do you know what firm it
19 is?

20 A. I don't recall.

21 Q. Was it Conley Rose?

22 A. No, no, no. It was in San Francisco.

23 Q. So what discussion did you have with Farah at
24 Artemia in March of 2003 about possibly suing using your
25 patent?

1 A. Well, the discussion we had was that, you
2 know, our business was not doing well, and here were
3 some of the products that were taking business from us,
4 and we were trying -- we were discussing trying to raise
5 some capital so we could get into the market properly.
6 So she was trying to help me raise capital.

7 Q. And she was doing that by suggesting that you
8 could sue Ergotron to raise capital; is that correct?

9 A. No, she didn't suggest that at all. I said,
10 here -- here are some folks that we feel are infringing
11 our patent, and, you know, our business is not growing.
12 We're having difficulties.

13 Q. But you didn't sue Ergotron in 2003, did you?

14 A. I didn't sue anyone in 2003.

15 Q. Isn't it true that by 2003, you had already
16 engaged Conley Rose regarding this matter?

17 A. No, that's not true.

18 Q. When did you engage Conley Rose?

19 MR. NELSON: May we approach -- or I
20 could just say, I think we're treading on close
21 privilege grounds here, and we would appreciate -- I
22 think you can answer yes or no to that or give a date,
23 but --

24 MR. NIEDERLUECKE: That's all I'm looking
25 for, Your Honor, is a date. I don't --

1 Q. (By Mr. Niederluecke) And then I'll tell you,
2 I don't want you to disclose any communications you had
3 with your attorneys. I'm just looking for the facts of
4 when you met with people and when you engaged people,
5 okay?

6 A. But what --

7 Q. So my question is --

8 A. Yes.

9 Q. -- just solely, when did you engage Conley
10 Rose regarding this matter?

11 A. In 2006.

12 Q. 2006?

13 A. Yes.

14 Q. What --

15 MR. NIEDERLUECKE: Withdraw that.

16 Q. (By Mr. Niederluecke) Now, you're familiar
17 with Electrohome, and we spoke about them, right?

18 A. Yes.

19 Q. And are you aware -- they're not in business
20 anymore, correct?

21 A. That's correct.

22 Q. And do you know when they went out of
23 business?

24 A. Quite a while ago.

25 Q. Was it in the 2000s?

1 A. I can't recall.

2 Q. Certainly, they would have had many
3 documents, wouldn't they, relating to their work with
4 you in the mid 1990s on the dual LCD displays?

5 A. I'm not sure what they have.

6 Q. Well, you certainly were working with them in
7 the mid 1990s to develop the dual LCD product, right?

8 A. I worked on that project and the two-pack as
9 well.

10 Q. And -- and we've -- we've seen the
11 information on the screen. It was Electrohome who was
12 receiving purchase orders from Bloomberg; isn't that
13 right?

14 A. I've seen purchase orders in this lawsuit.

15 Q. But since you waited till 2006 to sue
16 Ergotron and the other Defendants in this case, we
17 weren't able to obtain those kind of documents, were we?

18 A. I don't know. I mean, I don't control what
19 happened to Electrohome.

20 Q. Well, but you controlled when you filed this
21 lawsuit, right?

22 A. Actually, I didn't. I mean, I -- of course,
23 the date when the lawsuit was filed, but there were
24 circumstances affecting -- well, that's all I can say.

25 Q. Now, Mr. Moscovitch, the December 2000 --

1 you -- I'm on my last topic here, you'll be happy to
2 know.

3 You have a December 2003 license agreement
4 between you and Mass; is that correct?

5 A. Yes.

6 Q. And that's the one that you signed on behalf
7 of yourself and on behalf of Mass, correct?

8 A. Yes.

9 Q. And isn't it correct that the December 2003
10 license agreement was the only exclusive license
11 agreement that you had ever given on '978 patent?

12 A. That's correct.

13 Q. Mass had not -- now, even though you had
14 given Mass that exclusive license agreement in December
15 of 2003, you had not -- Mass has not paid you one penny
16 of royalties under the '978 patent; isn't that correct?

17 A. They haven't paid me royalties because they
18 haven't been in the position to pay me.

19 Q. But you believe that they owe you, as a
20 matter of that license agreement, for those royalties,
21 correct?

22 A. Yes, I do.

23 Q. How much do they owe you?

24 A. I'm not sure. I'd have to calculate it up.

25 Q. Is it in the millions?

1 A. I would -- I would think so.

2 Q. Now, even though Mass owes you money in the
3 millions, isn't it correct that Mass hasn't listed that
4 liability to you on any of its financial statements?

5 A. Well, they can't pay it, and so -- you know,
6 there's no way that they can pay it, so...

7 Q. So my question is whether or not Mass, the
8 company --

9 A. Yeah.

10 Q. -- has indicated anywhere in its financial
11 statements that it owes you a royalty for sales under
12 the '978 patent?

13 A. No, we haven't indicated it because they
14 can't pay the money, so...

15 Q. And so when Mass went out to seek funds from
16 all these investors, Mass wasn't telling the investors
17 about the liability that it had to you; is that correct?

18 A. The only time we actually went out to
19 investors was in 2002.

20 Q. So after 2002, you stopped attempting to
21 raise funds; is that correct?

22 A. I wrote a lot of business plans, but I didn't
23 raise any funds.

24 Q. And business plans, you didn't include
25 those -- those -- that obligation; is that correct?

1 A. We never went out with the business plans.

2 Q. And my question was just, in those business
3 plans, you did not include that liability; is that
4 correct?

5 A. That's correct.

6 MR. NIEDERLUECKE: Pass the witness, Your
7 Honor.

8 THE COURT: Cross-exam -- or direct
9 examination by Mr. Nelson.

10 DIRECT EXAMINATION

11 BY MR. NELSON:

12 Q. Good morning.

13 Let me just start --

14 A. Excuse me. Good morning.

15 Q. Let me just start at the very end and some of
16 these last questions.

17 Some of the last questioning was about the --
18 this exclusive license agreement. And I think, in front
19 of the jury, there was testimony and we saw documents
20 that although the written agreement was in 2003, it
21 extended back from the time it issued.

22 That was your testimony?

23 A. That's correct.

24 Q. Okay.

25 MR. NELSON: Matt, could we bring up

1 Mr. Moscovitch's deposition on May 23rd, 2008, Page 536?

2 It may just be easier for me to do this.

3 Q. (By Mr. Nelson) Okay. And, Mr. Moscovitch,
4 you recall the testimony from Mr. -- the questioning
5 from Mr. Niederluecke about the truth and veracity of
6 Paragraph 12 of your reissue declaration?

7 A. Yes.

8 Q. And we completed the questioning on the
9 October 19th deposition where you -- where you said that
10 you had cited those three patents.

11 This is your October -- sorry -- the May
12 23rd, that was redirect on that very same day, and could
13 you just read for -- for the Judge starting on Page 13
14 through Line 22?

15 MR. NELSON: Is that --

16 MR. NIEDERLUECKE: Your Honor, I would
17 object to this. The witness is here to testify, and I
18 think it's improper. It wasn't for completeness, and I
19 think it's improper to have him just read from
20 deposition testimony that he previously provided.

21 THE COURT: Overruled. Overruled.

22 A. Where did you want me to start?

23 Q. (By Mr. Nelson) Start -- yes. Go ahead and
24 start actually on Line 7.

25 A. Seven?

1 Q. Yeah, which is a question right there.

2 A. Could you straighten it?

3 Q. I'll try. There we go.

4 A. Okay.

5 QUESTION: Now, by the time you had met
6 with Mr. Miller and Mr. Elchuk about your reissue
7 application, what patents had you and Mr. Waraksa
8 reviewed?

9 ANSWER: We had reviewed three patents
10 that had been cited by the Patent Office during the
11 prosecution of the '939 patent.

12 QUESTION: How had they come to Mass'
13 attention in that file history, the '939 patent file
14 history?

15 ANSWER: The Patent Office had cited --

16 MR. NELSON: Sorry. I apologize.

17 ANSWER: -- cited those patents during
18 the prosecution.

19 QUESTION: So then looking at Paragraph
20 12 of your reissue declaration, and particularly that
21 last sentence, how do you characterize the accuracy of
22 the statements you made in that declaration?

23 ANSWER: I would characterize it as being
24 true and accurate.

25 MR. NELSON: Thank you.

1 And could we also, please, go back --
2 let's go to Plaintiff's Exhibit 1188, what we just saw.

3 Q. (By Mr. Nelson) And, Mr. Moscovitch, there is
4 some testimony about this.

5 MR. NELSON: Very briefly, let's blow up
6 the header, please.

7 Q. (By Mr. Nelson) And I think you testified to
8 this in part of your answer, but let me just clarify.
9 This was an effort for you to raise money for your
10 business in 2003; is that right?

11 A. Well, we were talking about trying to go out
12 and raise some money.

13 Q. Okay. Thank you.

14 And --

15 A. Can I answer one more thing?

16 Q. Yes, of course.

17 A. Yeah. I believe that the -- that this is the
18 information that Eric used --

19 Q. You mean the bottom e-mail then?

20 A. Yes. I believe -- I'm not sure of the
21 dates -- the exact dates, but I believe it's the
22 information he used when he contacted Dell and wrote
23 that e-mail about Ergotron.

24 Q. This was -- this e-mail of July 27th, 2001,
25 this was in between the time that you sent the notice

1 letter to Ergotron, and that was what -- remind the
2 Judge -- that was May of 2001 when you sent the -- a
3 letter to Ergotron; is that right?

4 A. I believe so.

5 Q. And you got a response back in June of 2001;
6 is that right?

7 A. Correct.

8 Q. And then in August of 2001, less than a month
9 after this, is when you notified Dell; is that right?

10 A. I believe so.

11 Q. And since that time, were you trying to work
12 with Dell to -- and try to make your company work as a
13 viable business during that time?

14 A. Absolutely.

15 MR. NELSON: And let's go to Plaintiff's
16 Exhibit 357.

17 Q. (By Mr. Nelson) This is the June 18th, 2001,
18 letter, their response to you; is that right?

19 A. To my lawyers, yes.

20 Q. Yeah.

21 MR. NELSON: And let's blow up, again,
22 that last paragraph, please.

23 Q. (By Mr. Nelson) And, Mr. Moscovitch, were you
24 expecting, based upon this last sentence, a response
25 back from Ergotron?

1 A. Yes, we were.

2 Q. And did you ever get a response back?

3 A. No, we never did.

4 Q. Okay. And, Mr. Moscovitch, in your reissue
5 declaration, when you said that Mr. Waraksa failed to
6 appreciate the scope of the claims during the original
7 prosecution, was that testimony accurate?

8 A. Yes.

9 Q. And you did attend Mr. Waraksa's deposition
10 in this case; is that right?

11 A. Yes, I did.

12 Q. And didn't he confirm during the deposition
13 that he failed to appreciate the scope of the claims?

14 A. Yes, he did.

15 Q. Mr. Moscovitch, in your opinion, was -- did
16 the E-Book ever work?

17 A. No, never worked. And it was canceled. In
18 the end, the whole project was canceled.

19 Q. Are you aware of anyone who's ever tried to
20 submit a patent on this E-Book?

21 A. No.

22 THE COURT: Let me ask a question of
23 Mr. Nelson. When was the E-Book canceled? And I'll ask
24 the witness.

25 MR. NELSON: The record is unclear, but

1 go ahead.

2 Q. (By Mr. Nelson) When was the E-Book canceled?

3 A. The E-Book was canceled sometime in 1995. In
4 April of 1995, we were trying to pass the CISPR B, and
5 we were in the laboratory. At the same time, I was
6 working on the two-pack, and then I began the LCD II.
7 And sometime in 1995, I convinced Susan to cancel the
8 project, and she agreed that it didn't make sense to put
9 any more money into it at all.

10 MR. NELSON: Let's bring up Plaintiff's
11 Exhibit 190.

12 THE COURT: And let me ask, what were the
13 dates of the invoices to Bloomberg?

14 MR. NELSON: Well, the invoices to
15 Bloomberg were in 1994, but, actually, let me just show
16 you --

17 MR. NIEDERLUECKE: Yeah. I was just
18 going to say, they were April and October -- April and
19 September of 1994 were the two invoices.

20 MR. NELSON: Can we bring up Plaintiff's
21 Exhibit 10, I believe?

22 Let's go to the next page. What's -- can
23 we blow up the date? And let's then blow up the last
24 paragraph as well.

25 Q. (By Mr. Nelson) Is this a subsequent revision

1 and discussion about that purchase order in January,
2 1995?

3 A. Well, they're talking about suppliers and
4 supplier orders.

5 Q. Okay. And could you please read for the
6 Judge, Mr. Moscovitch, just -- actually, you can read
7 that entire -- entirety of what's blown up.

8 A. Okay. Supplier orders commenced in the
9 summer of '94. Planning to build in October '94.
10 Production was told to be ready to build in October and
11 subsequently in November and December.

12 Suppliers were told to put on the brakes
13 depending on commitments and dollar value in
14 mid-December '94 and wait to commence shipping on our
15 instructions.

16 Q. And this was after these purchase orders that
17 you discussed with Mr. Niederluecke, right?

18 A. I believe so.

19 Q. Yeah.

20 MR. NELSON: And let's bring up, I
21 think -- I think it's Defendant's Exhibit 1118.

22 No. Try 1116. Excuse me.

23 THE COURT: Let me --

24 MR. NELSON: I'm sorry.

25 THE COURT: Let me just ask counsel for

1 Defendant to refresh my memory as to what the testimony
2 was of the Bloomberg witnesses regarding whether those
3 were shipped, and if so, when.

4 MR. NIEDERLUECKE: The testimony was that
5 they were shipped.

6 If you'll recall, Your Honor, there was a
7 selection of 20 units that Mr. Roarty had prepared a
8 spreadsheet for that showed when they were received by
9 Bloomberg. It wasn't an exhaustive list.

10 MR. NELSON: And, Your Honor, this is
11 actually what I put up on the screen right here.

12 MR. NIEDERLUECKE: Defendant's Exhibit
13 1116 was a -- as I said, it's not an exhaustive list,
14 but it provides some of these model numbers that were
15 received at Bloomberg, the date they were received, and
16 then the dates they went to the customers.

17 And I believe -- well, that's that
18 information. The rest of the exhibit actually shows --
19 for each one of those line items shows the detail
20 about -- more detail about that shipment.

21 THE COURT: And that shows the date
22 received by the customer, one in December of '94 and the
23 rest in '95?

24 MR. NELSON: Well, the December 1994 one,
25 Your Honor, was -- that was the testing laboratories,

1 Sertelecom, so that was undergoing some testing.

2 THE COURT: Okay.

3 MR. NELSON: And then --

4 MR. NIEDERLUECKE: Then you can see
5 there's --

6 MR. NELSON: -- there's five -- there's
7 probably about seven or eight that were there during
8 that time period.

9 MR. NIEDERLUECKE: If you'll blow up the
10 top half. All of that before the -- was it -- April
11 26th is the -- is the critical date, Your Honor. April
12 26th of 1995.

13 THE COURT: Okay.

14 Q. (By Mr. Nelson) And you were aware, Mr.
15 Moscovitch --

16 THE COURT: And --

17 MR. NELSON: I'm sorry, Your Honor.

18 THE COURT: -- ask him to -- of those
19 five or six that were prior to the -- April 26th, 1995,
20 does anyone know who these people are that were
21 receiving them or what they were received for?

22 MR. NELSON: Well, yes, Your Honor. Can
23 I ask a preliminary question, and then we'll get to
24 that?

25 THE COURT: All right.

1 Q. (By Mr. Nelson) Mr. Moscovitch, did you
2 know -- any of these shipments prior to April 1995, did
3 you know that they had gone to these customers, besides
4 this Sertelecom one that went to the laboratory?

5 A. I don't. I do not.

6 Q. Okay. And could you answer the Judge's
7 question? Do you know how and whether -- the
8 circumstances in which they went to the customers?

9 A. My -- my conclusion could only be that they
10 would be engineering samples, because they were not --
11 they did not have any agency approvals, and they could
12 not be sold.

13 So they could be engineering samples, but
14 they couldn't be -- they really couldn't be sold.

15 THE COURT: And what agency approvals
16 were needed?

17 THE WITNESS: CISPR B was the policy of
18 Bloomberg.

19 THE COURT: And what is CISPR B?

20 THE WITNESS: CISPR B is a European
21 standard for radiation emissions. And if you cannot
22 shield out the emissions, then you can't sell the
23 product because it's -- it doesn't pass safety for use
24 by people.

25 Q. (By Mr. Nelson) Let me show you two documents

1 on this.

2 MR. NELSON: First, let's go to
3 Plaintiff's Exhibit 500.

4 THE COURT: Let me just -- kind of
5 hopscotching here, but while we're on this point, let me
6 ask Defendants what their response to that point is.

7 MR. NIEDERLUECKE: Well --

8 THE COURT: And you're welcome to ask the
9 witness any questions you'd like.

10 MR. NIEDERLUECKE: Certainly. And some
11 of this is based on the Bloomberg testimony that came
12 in, Your Honor.

13 THE COURT: All right.

14 MR. NIEDERLUECKE: The Bloomberg
15 testimony --

16 THE COURT: Remind me of what that is.

17 MR. NIEDERLUECKE: -- is that these were
18 production units. They were not engineering samples.
19 The Bloomberg testimony is that these were shipped out
20 to the customers. They were used. And that's what the
21 detail information provides.

22 I'll note for the Court, obviously,
23 Bloomberg is in New York, and the testimony that
24 Bloomberg is in New York is the first sale actually is
25 to Bloomberg in New York. And that's why the receipt at

1 Bloomberg on the left-hand side would show evidence of
2 the first sale that went on.

3 And Bloomberg didn't sell these to the
4 customers. They -- they would send them to their
5 customers. They lease them as part of their services.
6 So it's really not -- the second one is -- that's why it
7 says received by customer. So that's the testimony
8 there.

9 CISPR B, of course, is a European
10 standard. It's not a United States standard. And there
11 was testimony in the exhibit that stated that they --
12 that it could meet the lower U.S. standards.

13 THE COURT: Now --

14 MR. NIEDERLUECKE: There's conflicting
15 testimony on the whole CISPR B --

16 THE COURT: Are there any sales beyond
17 that -- or distribution beyond that last one there in
18 November of '95?

19 MR. NELSON: Can I answer that one first?

20 MR. NIEDERLUECKE: Yes.

21 MR. NELSON: Go ahead.

22 MR. NIEDERLUECKE: I was going to say,
23 it's my understanding, Your Honor, we did not get that
24 information from Bloomberg. They were a third party.
25 They didn't -- we tried to get it, but trying to get

1 Bloomberg to help us out was a little tough. They
2 didn't want to -- their lawyer, at least, wasn't real
3 interested in giving us that.

4 So this was the best we could do and
5 didn't want to inconvenience them for the rest of the
6 sales, so he had just prepared like a -- here's 20
7 examples.

8 MR. NELSON: Your Honor, the subpoena
9 called for all records of this device, and there was
10 actually questioning at Mr. Roarty's deposition from
11 Bloomberg, who was the corporate witness, and this was
12 what they produced in response to that.

13 THE COURT: Okay. Thank you. Go ahead.

14 MR. NELSON: And to be clear, Your Honor,
15 he did say in that deposition that there probably were
16 others, and there was a request to follow up, and there
17 was nothing -- anything ever produced because of that,
18 so...

19 Q. (By Mr. Nelson) Let's go to -- let's talk
20 about CISPR B a little bit and the standard, and,
21 Mr. Moscovitch, why you felt that the failure to pass
22 CISPR B, why you didn't think that it was a working
23 device because of it.

24 MR. NELSON: Let's go to Plaintiff's
25 Exhibit 500.

1 A. Well, before we get to CISPR B, I believe
2 it's also correct that the unit -- I don't believe that
3 the unit passed that FCC-B, so...

4 THE COURT: If what?

5 A. FCC is the standard in the United States,
6 which is an agency approval standard in the U.S.
7 There's FCC-A and FCC-B and CISPR B.

8 But CISPR B was the standard that Bloomberg
9 had to have for their product because they sold their
10 product worldwide.

11 MR. NELSON: And let's blow up the
12 paragraph beginning, it is therefore.

13 A. This is a letter from --

14 MR. NELSON: And let's blow up the date,
15 please, at the top.

16 A. Okay. So just for clarification, Sertelecom
17 was based in Ottawa, Ontario, and was the testing
18 laboratory for all of Bloomberg's product worldwide, and
19 Bloomberg had to have all their product approved before
20 they could sell it.

21 What it says here, It is therefore our
22 opinion that all devices designed for use by Bloomberg
23 meet the most stringent global requirements unless
24 specific written exception from Bloomberg LP be
25 received.

1 Q. (By Mr. Nelson) And to your knowledge,
2 Mr. Moscovitch, was there any exception granted by
3 Bloomberg or Sertelecom or you with respect to the
4 E-Book?

5 A. No.

6 Q. And to your knowledge, Mr. Moscovitch, would
7 any E-Book have to go out that did not meet the
8 certification, have to go out with some kind of
9 engineering sample or sticker that would label it as not
10 for use or as an engineering sample?

11 A. Yes. It would have to have engineering
12 sample on it, not for sale.

13 Q. And -- and, Mr. Moscovitch, there is some
14 testimony that in some of these Sertelecom tests, there
15 might have been one unit in testing that passed FCC.

16 Could you clarify -- or explain to the Judge
17 why -- if something passes in the lab for FCC, for
18 example, why it is still not necessarily ready to go out
19 into the market and pass the FCC Class B certification?

20 A. Sure. What happens in the -- when you're
21 testing the product, if the -- normally, what happens is
22 there are certain frequencies that the -- cannot be
23 shielded out.

24 And what you do is you take -- you -- first
25 of all, you sit down and you try to hypothesize how to

1 shield those frequencies. And then you take the product
2 apart and you build breadboards, mockups, and then you
3 test each change that you make, and you have to go in a
4 serial fashion.

5 So you have to test one, see if it has any
6 impact. Then you have to go back and test the others.
7 It's a very long process.

8 Q. And let's --

9 MR. NELSON: Let's first go to
10 Plaintiff's Exhibit 319.

11 And let's blow up that, please.

12 And, Your Honor, if you recall, there
13 were some dates in the February/March area.

14 Q. (By Mr. Nelson) And if you can see it -- and,
15 Mr. Moscovitch, please read for the Judge what's going
16 on here and the date and whether at this point, in March
17 1995, that it had passed CISPR B testing.

18 A. No, it hadn't passed CISPR B. This --

19 MR. NELSON: Let's blow up that last
20 sentence, please.

21 A. Sure.

22 Well, what we're doing here is -- just to
23 clarify, the plastic parts that we had used for -- for
24 developing the product, we decided that we would try to
25 encase the product completely in metal. Metal has

1 shielding capabilities.

2 So we actually went and made some prototype
3 parts of aluminum, and then we were shipping them to
4 Electrohome, and they were going to ship them on to the
5 laboratory, and we were going to do some testing in the
6 laboratory to see if that would have any effect on
7 trying to shield out some of these frequencies.

8 MR. NELSON: And let's then go -- I
9 believe it's Plaintiff's Exhibit 126.

10 No, that's not it. Bear with me.
11 Plaintiff's Exhibit 190.

12 Let's go to the last page of Plaintiff's
13 190, and let's blow up the second to last line -- third
14 to last line.

15 There we go.

16 Q. (By Mr. Nelson) Okay. And, Mr. Moscovitch --

17 MR. NELSON: Let's blow up the date,
18 please.

19 Q. (By Mr. Nelson) And what is this document,
20 Mr. Moscovitch?

21 A. This is just a note talking about CISPR B.

22 Q. Well, do you recall -- let's go to the first
23 page, so you can be reminded of what this meeting is and
24 what these notes are from.

25 MR. NELSON: And then let's go back to

1 the --

2 Q. (By Mr. Nelson) What is this -- where is this
3 meeting?

4 A. This meeting is at Bloomberg in New York.

5 Q. And were you discussing CISPR B at this
6 meeting?

7 A. Yes.

8 Q. Okay.

9 MR. NELSON: Let's go to the last page,
10 back where we were.

11 And can we highlight that, too, Matt?

12 Q. (By Mr. Nelson) What does that say?

13 A. It says that there's a CISPR B report coming,
14 but stop the process.

15 Q. Well, what does that mean, Mr. Moscovitch?

16 A. Stop -- stop the testing.

17 Q. And at this point, was it possible for any
18 production units to have achieved CISPR B of the E-Book?

19 A. No. The E-Book never achieved CISPR B.

20 There was one head only that, basically, was a mockup,
21 and it was surrounded by a special conductive foam all
22 the way around it on the outside, and they were able to
23 achieve CISPR B on that one mockup.

24 Q. And, Mr. Moscovitch, in addition to this
25 radiation problem and this testing problem, you were

1 aware that there was also significant problems with the
2 hinge and that it wouldn't stay in place, right?

3 A. Yes, there were problems with the hinge;
4 there were problems with the grounding of the hinge; and
5 there were problems with heating, power supply problems;
6 and there were problems with the electronic boards,
7 which were developed by another company.

8 Q. And, Mr. Moscovitch, were you aware of the
9 relationship between the radiation problems --

10 MR. NELSON: And I think actually it's in
11 the record, Your Honor, in Dr. Akin's testimony
12 yesterday.

13 Q. (By Mr. Nelson) But were you aware,
14 Mr. Moscovitch, of the relationship between the problems
15 with the hinge and then the problems of achieving CISPR
16 B testing -- CISPR B radiation testing?

17 A. Yes. You have to -- the hinge has to act as
18 a help in the grounding of the complete product, and
19 there were problems with that that we didn't have a
20 solution to at the time.

21 Q. And, Mr. Moscovitch, it was also your
22 testimony -- we spent a fair amount of time during your
23 direct examination, but could you just remind the Judge,
24 in your opinion, did the hinge design ever work for the
25 E-Book?

1 A. No, it never worked the way I intended it to,
2 and no one -- none of us could ever get it to work.
3 And we -- we went through about six different designs,
4 and there were at least three engineering reports
5 proposing other theoretical solutions to the problem.

6 Q. And even as late as 1995 --

7 MR. NELSON: Actually, let's go back to
8 Plaintiff's Exhibit 10 -- excuse me -- Plaintiff's
9 Exhibit -- yeah. Next page.

10 And actually, if you'll blow up the
11 handwriting here on the side. That's all right. On the
12 side. And let's highlight this tweaking the design.

13 Q. (By Mr. Nelson) And even as late as 1990 --
14 this was -- who was this handwriting from,
15 Mr. Moscovitch?

16 A. This is Susan Friedlander at Bloomberg.

17 Q. And this is still talking about how, in 1995,
18 you're -- you're tweaking the designs, is what it says,
19 and trying to make the design work for the hinge?

20 A. Yes. And she's also -- if you look at the
21 top statement, she's saying, should we demand anything
22 here for returned -- because they're returning --
23 they're returning things that are not working, and
24 they're trying to figure out if they should get money
25 back for those.

1 Q. And again, this is well after these purchase
2 orders, right?

3 A. That's correct.

4 MR. NELSON: And actually, let's just go
5 to Plaintiff's Exhibit 300 really quickly.

6 Q. (By Mr. Nelson) You are aware,
7 Mr. Moscovitch, that some of these early purchase orders
8 were actually canceled, right? Are you -- you are now
9 aware, right?

10 A. I am now aware, yes.

11 Q. Yeah.

12 MR. NELSON: Let's go to the second line
13 under quantity.

14 Q. (By Mr. Nelson) And this is -- this is what,
15 Mr. Moscovitch?

16 A. Flat panel cancellation.

17 Q. And just to be --

18 MR. NELSON: And let's go to the date so
19 that there's -- there's -- the record's clear. It's on
20 the top right side.

21 Q. (By Mr. Nelson) This is -- this is in 1994,
22 so it's before some of this later discussion, right?

23 A. Yes, correct.

24 Q. But I think it's your testimony that the
25 design and the changes were still ongoing, and in fact,

1 there was a cancellation from some of these first
2 purchase orders, and then later ones were -- were being
3 revised and tweaked, et cetera, right?

4 A. Well, yes. My job was to try to make the
5 product work and to try to get a product that could work
6 and could be produced in volume, but we were --
7 unfortunately, we were never able to achieve that.

8 Q. And just to be clear, Mr. Moscovitch, you
9 only know about these purchase orders and these delivery
10 dates because -- because of this case, because you
11 attended these depositions, and you've seen these
12 purchase orders in the past, what, six to eight months
13 or so; is that right?

14 A. Yes.

15 Q. And before that time, did you know about
16 these purchase orders?

17 A. No. They would not have shared that
18 information with me.

19 Q. And Mr. Niederluecke was questioning you
20 about that you were a supplier for bases. Why would
21 that still not indicate to you that there was a purchase
22 order -- or a confirmed purchase order where the
23 products were being delivered?

24 A. Well, we were -- we have a purchase order for
25 bases, but I think there were four or five different

1 types of bases that we were developing and testing out.
2 And they were ordering bases from us, but I'm not sure
3 why, frankly, they were ordering bases.

4 MR. NELSON: Well, let's go to -- back to
5 Plaintiff's Exhibit 10, please, and go back to the
6 second page.

7 Q. (By Mr. Nelson) You were one of these
8 suppliers --

9 MR. NELSON: Let's blow up that last
10 paragraph.

11 Q. (By Mr. Nelson) You were one of these
12 suppliers that was told to, quote, put on the brakes at
13 this time in January 1995?

14 A. Yes, correct.

15 Q. Okay.

16 MR. NELSON: Let's -- where is put on the
17 brakes?

18 And let's just highlight that, please, on
19 the third -- second to last line. Yeah.

20 Q. (By Mr. Nelson) And, Mr. Moscovitch, again,
21 in your opinion, did the hinge design ever work for its
22 intended purpose?

23 A. No.

24 Q. And why -- why didn't it even occur to you to
25 submit this E-Book as -- as a piece of prior art to the

1 Patent Office?

2 A. It never worked. It was a canceled project.
3 I mean, I never even thought about it. But it never
4 went into production, and it was not something that --
5 that I would do anything with as a product. I mean, it
6 wasn't a product. It was just, in the end, it was a
7 very long and expensive development project.

8 Q. Thank you.

9 MR. NELSON: And I think it's Defendants'
10 Exhibit 2. Is that the registered patent?

11 Let's go to Defendants' Exhibit 1.

12 There we go.

13 Q. (By Mr. Nelson) And, Mr. Moscovitch,
14 Mr. Niederluecke was questioning you about this --

15 MR. NELSON: I'm sorry. Your Honor, did
16 you have any more questions? Is there anything that we
17 can --

18 THE COURT: No.

19 MR. NELSON: Okay. Because we're
20 changing subjects.

21 Q. (By Mr. Nelson) On the --

22 MR. NELSON: Slightly.

23 Q. (By Mr. Nelson) On the registered patent,
24 this is the '170 patent, Mr. Moscovitch?

25 A. Yes, correct.

1 Q. And again, I think -- I want to make clear
2 your testimony, what you told to the jury. You knew the
3 patent number on this, right?

4 A. I knew the patent -- well --

5 Q. Well, let me ask a different -- this -- this
6 is of record in the '978 file history and was cited on
7 the patent, correct?

8 A. Yes, correct.

9 Q. And you disclosed this to your patent
10 attorneys as soon as you found out about it, right?

11 A. Yes. I sent him the letter from Mirek.

12 Q. Okay. All -- any prior art that you knew
13 about you told your lawyers about, right?

14 A. Yes.

15 Q. Okay. And could you just walk us through how
16 this particular -- and I think there were three or four
17 patents around this time that -- that you and your
18 lawyers disclosed to the Patent Office.

19 Can you just tell the Judge how that came to
20 pass?

21 A. Well, actually, I had sent a letter of
22 complaint to the Law Society about the way in which
23 Mirek had handled my whole filing of patents.

24 THE COURT: Wait. Who?

25 THE WITNESS: The Law Society of upper

1 Canada.

2 MR. NELSON: Mr. Waraksa.

3 THE COURT: All right.

4 THE WITNESS: Mr. Waraksa, the lawyer who
5 had handled the prosecution of the '939 patent.

6 I felt that he hadn't listened to me, and
7 he wouldn't listen to me and that I had suffered for
8 that. And I felt that -- you know, I knew that he
9 had -- he was having psychological problems -- serious,
10 very serious psychological problems, and he was under a
11 doctor's care, and I felt that -- he was still writing
12 patents.

13 And, first of all, I felt that I had
14 suffered damages, but also I felt that other potential
15 inventors might suffer the same problems that I had
16 incurred.

17 So I sent a letter of complaint, and they
18 asked for a response from him. And in that response
19 that he -- he answered them six months later, and he did
20 a patent search to say that I've uncovered these five
21 patents, and here's another reason why he would have
22 never got this -- his broad claim that he wanted, and --

23 Q. (By Mr. Nelson) And you immediately disclosed
24 that to your lawyers, right?

25 A. Yes. As soon as I got it, I called Mark on

1 the phone, and I told him, Mirek has sent me this
2 letter, and here's what he said. And he told me to send
3 it on to him, and he sent it on to the Patent Office.

4 MR. NELSON: And let's just -- let's go,
5 actually, to Defendants' Exhibit 1225 so we can actually
6 see this letter.

7 Let's first go to the second page, and
8 let's blow up the last part that lists the patents.

9 Q. (By Mr. Nelson) This -- this is what you
10 knew. So you knew -- you got this letter, correct?

11 A. Yes, that's correct.

12 Q. And you saw the patent number on it, right?

13 A. I saw five patents listed here, yes.

14 Q. And then you didn't hide the letter; you
15 immediately turned it over to your lawyers, right?

16 A. Yes, absolutely.

17 Q. Okay. And all these got cited to the -- to
18 the Patent Office?

19 A. No. Actually, only four of the five because
20 the fifth one was not prior art. He was wrong about
21 that.

22 Q. Oh, I see. Okay.

23 Because the filing date was afterwards?

24 A. I'm not sure.

25 Q. Okay.

1 MR. NELSON: And then let's just go back
2 to the first page and blow up the second paragraph,
3 please.

4 Q. (By Mr. Nelson) And this is Mr. Waraksa
5 discussing his health problems?

6 A. Yes.

7 Q. And I don't want to get into it too much, but
8 this is what he's telling you?

9 A. Yes.

10 Q. Okay. And were you -- during this timeframe
11 of '98, Mr. Moscovitch, were you trying to contact
12 Mr. Waraksa and trying to get his attention?

13 A. Yes, I was.

14 MR. NELSON: Let's go, please, to
15 Plaintiff's Exhibit 1180.

16 And let's blow up that through the first
17 line of the second paragraph. Actually, let's -- you
18 can blow up the entire letter. That's fine.

19 There we go.

20 Q. (By Mr. Nelson) Can you please read,
21 Mr. Moscovitch, your attempts to contact Mr. Waraksa and
22 whether he actually ever got back to you?

23 A. Yes.

24 I have tried to contact you without success
25 since January 9th, 1998. As indicated in my phone mail,

1 it is urgent that I talk to you immediately. I am most
2 concerned about preservation of certain patent
3 matters -- patent matters you are dealing with.

4 If I have not heard from you by February the
5 5th, 1998, I will have no choice but to take all
6 necessary steps, including contacting the Law Society,
7 to protect Mass.

8 Q. Okay. And you still were having difficulty
9 contacting him, right?

10 A. Yes.

11 Q. And you were not able to contact him before
12 your patent -- he didn't tell you when your patent
13 issued, right?

14 A. No. I met with him in the fall of 1997 when
15 he told me about all the issues he was having. He was
16 living in an apartment, and we met outside downstairs.
17 And he was not going to work any longer, and he was on
18 medication, and he was living on his own, away from his
19 family. He had a lot of issues.

20 And there was some matter that he was
21 supposed to take care of for me, and he asked me to
22 bring a check, which I did, and I gave him. And I
23 believe he had told me before that the patent had been
24 allowed -- or was -- he thought it was going to be
25 allowed, something to that effect.

1 And I was -- wanted to know when the patent
2 would issue. I wanted to know that it was a patent.
3 And I couldn't reach him after that. And I finally was
4 able to reach him, but the patent actually issued in
5 November of 1997, and when I reached --

6 Q. The original patent now, not the reissue.

7 A. The '939 patent. And he didn't know, and I
8 didn't know. And the way he found out was he went to
9 his office sometime in January, I think it was, about
10 three months later. It had been sitting on the floor of
11 his office for three months.

12 Q. It had been sitting on the floor of his
13 office for three months?

14 A. Yes.

15 Q. And during that time, did you know that it
16 had been issued?

17 A. No, I did not know.

18 Q. And after that is when you began the reissue
19 process, is that right, or sometime after that?

20 A. Well, I couldn't reach him, and I told my --
21 my corporate attorneys that I was very concerned, and I
22 didn't know what to do. And they -- they had their own
23 patent department, and they -- they introduced me to a
24 very senior patent lawyer there.

25 Q. And actually, let's clear up something

1 that -- on a slightly related point.

2 Mr. Niederluecke was questioning you about
3 this June 2000 Richardson Electronics proposal when he
4 was -- when you were saying that there was a patent that
5 was about to -- this patent was about to issue.

6 In June of 2000, had the patent issued yet?

7 A. No.

8 Q. And just to be clear, what is your knowledge
9 of when the patent actually issued?

10 A. The -- well, the patent issued on December
11 5th of 2000.

12 Q. And when was this lawsuit filed
13 approximately? July 2006?

14 A. July 7th, 2006.

15 Q. And that's well within the -- well within six
16 years; is that right?

17 A. Yes.

18 Q. Okay.

19 MR. NELSON: And, Your Honor, we're at
20 your pleasure. Do you want to go into any more detail
21 about Mr. Waraksa or what happened at this --

22 THE COURT: That's up to you.

23 MR. NELSON: Okay.

24 THE COURT: I think I will take about a
25 10-minute break.

1 MR. NELSON: Okay.

2 THE COURT: And you can decide whether
3 you want to put on any more.

4 COURT SECURITY OFFICER: All rise.

5 (Recess.)

6 COURT SECURITY OFFICER: All rise.

7 (Jury out.)

8 THE COURT: Please be seated.

9 All right. You may proceed.

10 MR. NELSON: Your Honor, we have one more
11 line of questioning, and then we're going to be done,
12 and we're going to pass the witness and potentially
13 rest.

14 Can we bring up the Waraksa deposition on
15 the transcript 166, 1 through 12? This prevents me from
16 using the document cam.

17 You got it, Matt? 166. I'm sorry.

18 Okay. And let's --

19 Q. (By Mr. Nelson) Mr. Moscovitch, you were
20 present at this deposition?

21 A. Yes.

22 Q. And you testified before that the reason why
23 you filed for a reissue was because Mr. Waraksa failed
24 to appreciate the scope of the claims, correct?

25 A. Yes.

1 Q. Okay. And Mr. Waraksa, for all that -- the
2 problems you had between him (sic), he actually
3 confirmed this point, didn't he?

4 A. Yes, I believe he did.

5 Q. Okay. Well, let's just -- could you please
6 read for the Judge what Mr. Waraksa -- the question and
7 answer here?

8 A. Sure.

9 Whether you overlooked it or whether you
10 didn't consider it or for whatever reason, you failed to
11 appreciate that --

12 ANSWER: It could have had claims of
13 different scope, yes.

14 MR. NIEDERLUECKE: And, Your Honor, if I
15 could, I think we may need to read in the preface to
16 that, try to see if we can add some context to that,
17 Your Honor.

18 Before the question was: Sir, will you
19 listen to my question?

20 Assuming that he got broader coverage
21 than the original patent --

22 ANSWER: Yes.

23 QUESTION: -- that would suggest that the
24 Brooks patent was unnecessarily limited, correct?

25 The deponent said: It had a different

1 scope.

2 So that's what was the preface into that
3 question.

4 THE COURT: All right. Thank you.

5 Q. (By Mr. Nelson) And finally, briefly,
6 Mr. Moscovitch, you testified about the -- your dealings
7 with Dell.

8 Did you rely on any actions by Dell in
9 building product and making tooling and -- and -- and
10 conforming to what they wanted?

11 A. Yes, I did.

12 Q. Did that cost you money?

13 A. Yes.

14 Q. And did -- okay. I'll stop right there.
15 Thank you.

16 MR. NELSON: Pass the witness.

17 THE COURT: All right. Redirect -- or
18 recross?

19 RECROSS EXAMINATION

20 BY MR. NIEDERLUECKE:

21 Q. Mr. Moscovitch, your patent doesn't speak
22 about EMI requirements, does it?

23 A. No. It's a mechanical patent.

24 Q. And whether or not it passes CISPR B doesn't
25 have any effect on whether or not -- on any of the

1 limitations in your claim of the '978 patent, correct?

2 A. That's correct.

3 Q. Now, you mentioned that this -- the E-Book
4 product couldn't pass FCC-B, right?

5 A. There was -- as a production product, no.

6 Q. Right.

7 A. As a product, no.

8 Q. But you remember back then that in 1994, the
9 United States hadn't implemented FCC-B for this, had
10 they?

11 A. I don't recall.

12 Q. It was, in fact, relying on the looser
13 standard of FCC-A, wasn't it, for this product?

14 A. Could be. I'm not sure.

15 MR. NIEDERLUECKE: And if we can pull up
16 Plaintiff's Exhibit -- Plaintiff's Exhibit 500.

17 Q. (By Mr. Niederluecke) You were talking about
18 Bloomberg's requirements for CISPR B with Mr. Nelson.
19 Do you remember that?

20 A. Yes.

21 Q. And he pulled up a document, which will come
22 up in a minute, Plaintiff's Exhibit 500. This is that
23 Sertelecom letter, right?

24 A. Yes, correct.

25 Q. And in fact, what was pulled up --

1 MR. NIEDERLUECKE: And let's go to the
2 second page. I'm not sure exactly --

3 Q. (By Mr. Niederluecke) What was pulled up
4 about the requirements of CISPR B was actually the
5 recommendations from Sertelecom; isn't that right?

6 A. Well, they're the testing agent for
7 Bloomberg.

8 Q. In fact, if you go in the middle --

9 MR. NIEDERLUECKE: Kind of blow up the
10 middle part there. Just -- yeah. Blow up the -- there.
11 That's good.

12 Q. (By Mr. Niederluecke) And all this is, is a
13 letter suggesting -- starts with in this regards. This
14 is a recommendation, isn't it, from Sertelecom to
15 Bloomberg that they should insist on using European
16 Class B requirements; isn't that right?

17 A. Yes, because if they meet CISPR B, then they
18 meet all standards.

19 Q. And if you -- and it talks even above about
20 the current Class A FCC, doesn't it?

21 A. Correct, yes.

22 Q. Okay. Now, Mr. Moscovitch, whether or not it
23 meets any of these CISPR standards or FCC standards
24 didn't affect any sale or offer for sale from
25 Electrohome to Bloomberg, did it?

1 A. I'm not sure.

2 Q. I mean, that only -- those only apply when
3 you put them out in use; isn't that correct?

4 A. Yes. You cannot use them -- well, you can't
5 use them unless they have a sticker on them that says
6 they're engineering samples.

7 Q. So CISPR B doesn't say you can't sell them,
8 does it?

9 A. Well, you can't sell a product -- no, you
10 cannot sell a product -- if I sell my product without
11 agency approval, I'm subject to a serious fine, and I
12 have to withdraw the product.

13 Q. What agency approval?

14 A. We do CISPR B.

15 Q. In Canada.

16 A. Well, we sell our products, so we have to
17 pass CISPR B.

18 Q. Oh, you're talking about Mass as a --

19 A. Mass as a company.

20 Q. -- seller.

21 A. Yes. We cannot sell our products or else
22 we're subject to very large fines and our product is
23 withdrawn. We lose our ability to sell it.

24 Q. Well -- so just to summarize this, at the
25 time, the requirements in the United States were FCC,

1 Class A; isn't that correct?

2 A. I believe so.

3 Q. Okay. And that -- this product could meet
4 FCC, Class A, couldn't it?

5 A. I'm not sure if it could, actually.

6 Q. And you're not sure if it couldn't, right?

7 A. I don't -- well, it wasn't a production
8 product, so -- but I'm not sure if it met Class A. In
9 the laboratory, it may have but not as a production
10 unit.

11 Q. You were involved in all of the CISPR B
12 testing, right?

13 A. Not all of it. I was brought in at the end
14 because Susan put a SWAT team together, what she called
15 a SWAT team.

16 Q. So you had some significant involvement.

17 A. At the beginning, I wasn't involved. It was
18 only in -- I'm thinking late '94, sometime in '95 that
19 she brought me into the project.

20 Q. And you also, in 1994, produced 800 or more
21 bases for these E-Books, didn't you?

22 A. I don't think I produced that number, no.

23 Q. You didn't supply bases to Bloomberg --

24 A. I did --

25 Q. -- like you testified to the jury?

1 A. I did supply bases, but I don't think I
2 supplied that volume of bases.

3 Q. And even though you were supplying bases and
4 you were involved in this testing, it's your testimony
5 to the Court that you really didn't know what was going
6 on and what Electrohome was even doing with these units?
7 Is that your testimony?

8 A. Well, all I'm saying is that the goal of the
9 exercise was to produce production units. That was the
10 goal. That's why we did everything. But it never
11 worked. So in the end, we had to cancel the whole
12 program.

13 Q. In fact, that's a good point.

14 MR. NIEDERLUECKE: Let's bring up
15 Plaintiff's Exhibit 10, if we could.

16 THE COURT: Let me interrupt you a
17 second, Mr. Niederluecke, and ask you -- refresh my
18 memory as to what evidence, if any, you have with --
19 from Electrohome with regard to this issue of whether
20 any were produced or not.

21 MR. NIEDERLUECKE: Your Honor, that's --
22 that's the problem I was eliciting in the earlier
23 testimony. Electrohome is debunk now. We couldn't get
24 any evidence -- well, I mean, from the company
25 Electrohome. They don't exist.

1 THE COURT: Did you run down any of the
2 people that worked on this with Electrohome?

3 MR. NIEDERLUECKE: We weren't able to,
4 Your Honor. Apparently, whatever assets got sold is
5 somebody in California, and we were never able to get
6 from Electrohome themselves -- we do have -- I mean,
7 Mr. Moscovitch produced documents that related somewhat,
8 and then we have the Bloomberg documents that show the
9 purchase orders and show the actual units and sales, and
10 then we have the testimony of Bloomberg employees who
11 said that these were shipped out to customers during
12 that timeframe.

13 THE COURT: Okay. Thank you.

14 MR. NIEDERLUECKE: But what I'm trying to
15 focus on, Your Honor, is that regardless of the sales,
16 the purchase orders, offers for sale...

17 Let's go to the next page.

18 Justin, is this the one you had up
19 earlier? I apologize.

20 MR. NELSON: No. I had Plaintiff's 10.

21 MR. NIEDERLUECKE: Oh, thank you. That
22 was it.

23 Plaintiff's Exhibit 10, please.

24 Q. (By Mr. Niederluecke) While she's pulling
25 that up, let me ask --

1 MR. NIEDERLUECKE: There we go. Let's go
2 to the next page.

3 Q. (By Mr. Niederluecke) This is a document sent
4 from Susan Friedlander to you; is that correct?

5 A. Can you go back to the first page?

6 Q. Sure.

7 A. Yes. But if you go to the second page --

8 MR. NIEDERLUECKE: Let's go to the second
9 page.

10 A. I'm not sure who authored the document
11 because the document is sent to Susan Friedlander.

12 Q. (By Mr. Niederluecke) And so -- so it's your
13 understanding that she then put some notes on here and
14 sent it to you?

15 A. That's right.

16 Q. Okay.

17 MR. NIEDERLUECKE: Let's pull up that
18 bottom in summary part again.

19 Q. (By Mr. Niederluecke) Now, let's start with
20 the first part of this.

21 This is the document you had, right?

22 A. She sent me a copy. It was in my file.

23 Q. Okay. So you knew, as of the time she sent
24 this to you, that the suppliers were -- were ordered --
25 were commencing orders in the summer of '94 and were

1 planning to build in October of '94, weren't they?

2 A. That's what it says here, yes.

3 Q. Okay. And you'd be -- you'd be building
4 those orders according to a purchase order, wouldn't
5 you?

6 A. I would assume there would be some order.

7 Q. And, in fact, it says production was told to
8 be ready to build in October and then subsequently in
9 November and December, correct?

10 A. That's what it says, yes.

11 Q. So at that time, you were being told, because
12 of these supplier orders, because of the purchase
13 orders, that you had to be ready to produce; isn't that
14 right?

15 A. Well, it says -- it does say that they were
16 told to be ready to build, yes.

17 Q. Now, how do you build if you don't have a
18 purchase order?

19 A. Well, how do you build if you don't have a
20 product that works?

21 Q. Well, you built the product, right?

22 A. Yes, but it still didn't -- didn't work.

23 Q. You built the product. In fact, you had
24 detailed design drawings, didn't you?

25 A. Well, yes -- well, those were checking

1 drawings, but yes.

2 MR. NIEDERLUECKE: Could you bring up
3 Defendants' Exhibit 145?

4 Q. (By Mr. Niederluecke) You had created these
5 drawings well before this -- the date of this letter,
6 January 25th, 1995, didn't you?

7 A. Oh, yes. These were checking drawings, and
8 we needed -- we actually -- as you saw in the earlier
9 documents, there's tooling.

10 Q. And in fact, you could use these drawings or
11 the underlying data to manufacture the E-Book design
12 disclosed here, right?

13 A. Yes. And -- you could, and we did, but it
14 didn't work.

15 MR. NIEDERLUECKE: Let's go to the last
16 page of that exhibit, if we can.

17 Q. (By Mr. Niederluecke) And that's the E-Book
18 design there in that drawing package; is that correct?

19 A. That's an exploded view with a -- one of the
20 bases, yes.

21 MR. NIEDERLUECKE: And can you pull up
22 the date to that document?

23 Q. (By Mr. Niederluecke) This shows that even as
24 far back as August of 1993, there were -- there was a
25 design that could be manufactured; isn't that correct?

1 A. These are taken off the CAD data, yes.

2 MR. NIEDERLUECKE: Can we pull up
3 Plaintiff's Exhibit 300?

4 Almost done, Your Honor.

5 Q. (By Mr. Niederluecke) And Plaintiff's Exhibit
6 300, hopefully, will be the purchase order Mr. Nelson
7 had asked you about that was a cancellation.

8 MR. NIEDERLUECKE: And can we just blow
9 up the whole main text?

10 Q. (By Mr. Niederluecke) Do you recall that
11 testimony?

12 A. Yes.

13 Q. And it showed that in -- in -- at least on
14 April 5th, 1994, which is that date in the middle upper
15 part --

16 A. Yes.

17 Q. -- that there was a cancellation fee that was
18 being paid; is that right?

19 A. Yes, that's correct.

20 Q. And --

21 A. But it's not clear what it's for, because
22 above it, it says flat panel development.

23 Q. Right. They're paying on four -- on April
24 30th, on the right there, they paid Electrohome \$87,500
25 for a flat panel development; is that correct?

1 A. Yes. We still -- we were still working on
2 development.

3 Q. Yes. And this is going to Electrohome,
4 correct?

5 A. I believe so.

6 Q. Okay. And then they -- they canceled and
7 paid for something in the amount of \$284,600, right?

8 A. Yes.

9 Q. And that -- and that would -- in your
10 experience, that would be a fee that would be paid
11 because there was a design change, and there were some
12 parts that would have been ordered that wouldn't have
13 been needed anymore, so they were paying up for those?

14 A. I don't know what it's for.

15 Q. So this is -- April 5th is the purchase
16 order -- purchase order original date. Let's -- and if
17 you see, there's -- you see how it's purchase order
18 7267? Do you see that on the left there?

19 A. Yes.

20 Q. Okay.

21 MR. NIEDERLUECKE: Then let's go to
22 Plaintiff's Exhibit 1107.

23 A. As you can see, in Line -- it says Line 2 is
24 for reducing quantity after parts have been received.

25 Electrohome got most suppliers to keep these as low as

1 possible.

2 The reason they kept them as low as possible
3 is because the product wasn't working.

4 Q. (By Mr. Niederluecke) This is in April of
5 '94, correct?

6 A. That's right.

7 Q. Okay.

8 A. And this is -- this is the -- part of the
9 ongoing research and development.

10 MR. NIEDERLUECKE: And then if you can
11 blow up the middle again.

12 That's not the one I want.

13 (Discussion off the record.)

14 MR. TYLER: Your Honor, while they're
15 looking for that, I just want to advise the Court that
16 on direct, there were a few questions about Dell, so I'd
17 like to ask the witness a few questions --

18 THE COURT: All right.

19 MR. TYLER: -- after Mr. Niederluecke's
20 finished.

21 MR. TRIBBLE: Your Honor, we have no
22 objection to Dell going ahead --

23 MR. NIEDERLUECKE: I'm sorry. Pull up
24 Defendants' -- did I say Plaintiff's?

25 MS. FRIEDEMANN: Defendant's 1107.

1 MR. NIEDERLUECKE: Defendant's 1107. I
2 apologize.

3 Q. (By Mr. Niederluecke) So, Mr. Moscovitch, we
4 looked at this next purchase order update.

5 MR. NIEDERLUECKE: And if you could blow
6 it up again, Melissa. Thank you.

7 Oh, let's move on. That's the same one
8 we just looked at.

9 Q. (By Mr. Niederluecke) In fact, at that same
10 time, we saw, and the evidence will show, that there was
11 a purchase order 7270, which was the one for \$3.6
12 million for the new flat panels.

13 Do you recall that?

14 A. I've seen it during this trial.

15 Q. So, in fact, what -- what Bloomberg was doing
16 in April of '94 was saying, okay, we've got some extra
17 parts; let's reduce those down, because we don't need
18 them, and here's a new purchase order for \$3.67 million
19 worth of product; isn't that right?

20 A. I've only seen that here.

21 Q. Right. But that's what -- you understand
22 that's what that was, right?

23 A. I don't know what that was for. If you could
24 put it up, then I could see.

25 Q. I wasn't finding the exact purchase order, so

1 I wasn't able to put it up. We had it in the trial.

2 You looked at it, but...

3 Now, Mr. Moscovitch, if -- if the law says
4 that having drawings capable of making a product and
5 then offering that product for sale was sufficient to
6 make the device prior art, would you agree that you had
7 at least met those standards?

8 A. Well, my position is the product didn't work.
9 It was an R&D project. And again, we certainly tried to
10 make it work, and the goal was to make it work, and
11 that's why we started the project. But in the end, the
12 project didn't work, so...

13 Q. Okay. My question was: If -- if the law is
14 that you only need to have drawings sufficient to make
15 the device and an offer for sale of that device, would
16 you agree with me that you at least had those two
17 situations in place before April 25th, 1995?

18 A. I'm not an expert in that, so I --

19 Q. That's why I'm -- that's why I'm telling you.
20 I'm not saying what the -- I'm not asking you to say
21 what the law is; I'm telling you that if the law would
22 just require the making of drawings sufficient to make
23 the product and an offer for sale, would you agree with
24 me that those two events occurred prior to April 25th,
25 1995?

1 A. I didn't make an offer to sell the product.

2 Q. I didn't ask if you did, Mr. Moscovitch; I
3 asked if -- if everything you've seen now --

4 A. Uh-huh.

5 Q. -- if you're -- if you would agree with me
6 that at least those two points -- I mean, you agree --
7 let's start with the first one. You agree that there
8 were manufacturing drawings and data that was sufficient
9 to make the product, correct?

10 A. We could make parts for the product. Some of
11 the components, yes.

12 Q. In fact, Electrohome could make the entire
13 product, couldn't they?

14 A. They could order parts off the tools; they
15 could build prototypes, yes.

16 Q. So they could make the product, correct?

17 A. Well, prototypes, what I call prototypes.

18 Q. The product, correct?

19 A. I don't call it a product. I call it a
20 prototype.

21 Q. Okay. And what significance do you think it
22 matters to call it a prototype rather than a product,
23 Mr. Moscovitch?

24 A. A product is something that works the way we
25 intended it to work and could be sold and could be

1 produced in very large volume. That's a product.
2 Prototype is something that you build. And you can
3 build it exactly the way you want it to work and with
4 all the details, but if you're testing it and it doesn't
5 work, then it's a prototype, and you're trying to
6 resolve things. And if you have iterations as you go,
7 then that's a prototype.

8 Q. Mr. -- Mr. Moscovitch, you got paid for all
9 the development work you did on this project, didn't
10 you?

11 A. Not everything that I did, but I did get
12 paid.

13 Q. Yes. And you got paid for all of the bases
14 that you made and sold to Electrohome for the E-Book,
15 didn't you?

16 A. Not all of them because I kept changing them.
17 So there were a lot of bases that I made that didn't
18 work, and I didn't get paid for those.

19 Q. Okay. But I'm talking about the ones you
20 supplied to Electrohome.

21 A. There were some that I supplied that I got
22 paid, yes.

23 Q. Okay. And this was a -- you were in this to
24 make money, weren't you?

25 A. Absolutely.

1 Q. Okay. And when you supplied those parts, you
2 didn't put any restrictions on what could be done with
3 those parts, right?

4 A. Electrohome ordered them from me, and I
5 delivered them to Electrohome.

6 MR. NIEDERLUECKE: I have no further
7 questions. Thank you, Your Honor.

8 THE COURT: Anything further?

9 MR. NELSON: Just a few, three or four.

10 REDIRECT-EXAMINATION

11 BY MR. NELSON:

12 Q. I want to focus here on your intent.

13 MR. NELSON: Let's go back to Plaintiff's
14 500, which is that Sertelecom document.

15 Q. (By Mr. Nelson) Mr. Moscovitch, as that comes
16 up on the screen --

17 MR. NELSON: There you go. Yeah, we got
18 it.

19 And let's, again, blow up that fourth
20 paragraph. It is therefore.

21 Q. (By Mr. Nelson) Mr. Moscovitch, it was your
22 knowledge, right, that Bloomberg implemented this
23 recommendation from Sertelecom, right?

24 A. Yes. That's why I was part of that SWAT
25 team.

1 Q. And -- right. You actually participated in
2 efforts for it to get to -- to pass CISPR B. That's why
3 they were trying to do it, right?

4 A. Yes. There were even e-mails from Susan
5 saying that the whole thing was very depressing.

6 Q. Right. And to your knowledge, if the product
7 did not pass CISPR B, what did that mean to you?

8 A. It meant to me that the product could not be
9 sold.

10 Q. And so -- so not only did -- was it your
11 knowledge that Bloomberg intended to implement this
12 standard -- to your knowledge, Bloomberg actually
13 implemented the standard, right?

14 A. Yes, to my knowledge.

15 Q. Okay. And so --

16 MR. NELSON: Let's just actually briefly
17 go back to -- let's first go to Plaintiff's --
18 Defendant's Exhibit 145.

19 And go to the last page where it had that
20 date. I believe it was on the last page.

21 Yeah, last page date. There we go.

22 Q. (By Mr. Nelson) And, Mr. Moscovitch, this was
23 1993; is that right?

24 A. That's correct.

25 Q. And we've just seen documents here this

1 morning that there was constant changes and iterations,
2 including a development cancellation fee in 1994 and
3 changes after that.

4 In this -- these drawings, did the product
5 work at all or certainly for its intended purpose?

6 A. No. That's why we were constantly revising
7 it.

8 Q. And let's -- I think it's Plaintiff's Exhibit
9 181, which is our version of that purchase order.

10 MR. NELSON: And let's just blow up the
11 date, please -- or you can blow up the entire purchase
12 order, and let's focus in on that -- the date 7/6/1995.

13 Q. (By Mr. Nelson) Mr. Moscovitch, does --
14 doesn't this purchase order show that it was undergoing
15 revision as of July 1995?

16 A. Yes, that's correct.

17 MR. NELSON: And let's actually blow up
18 the entire purchase order and go down.

19 Q. (By Mr. Nelson) We talked about prototypes.

20 MR. NELSON: Let's zoom in on that
21 last -- the last part of the first line where it says
22 early prototypes.

23 A. It says, Revised purchase order. Details to
24 be discussed, especially early prototypes.

25 Q. (By Mr. Nelson) Yeah. And let's -- what

1 does -- what does it say on the top left? Warning:
2 Obsolete item?

3 A. Obsolete item.

4 Q. Yeah. And -- okay. And so just to be
5 clear --

6 MR. NELSON: Thanks.

7 Q. (By Mr. Nelson) Just to be clear,
8 Mr. Moscovitch -- and this will be my final question --
9 did you intend to deceive the PTO in any way by not
10 disclosing this failed prototype?

11 A. No, not at all.

12 Q. Thank you.

13 THE COURT: All right. Mr. Tyler?

14 MR. NIEDERLUECKE: May I ask a few
15 questions before you go?

16 MR. TYLER: Sure.

17 RECROSS EXAMINATION

18 BY MR. NIEDERLUECKE:

19 Q. Mr. Moscovitch, just one quick question --
20 one or two. Depends on how you answer it.

21 The obsolete part that you just read in
22 that -- in that, do you know whether Bloomberg pulled
23 these out of their current financial systems?

24 A. I have no idea where that came from.

25 Q. Do you know if that obsolete was placed on

1 there well after 1995?

2 A. I have no idea.

3 Q. Okay. Thank you.

4 CROSS-EXAMINATION

5 BY MR. TYLER:

6 Q. Good morning, Mr. Moscovitch.

7 A. Good morning.

8 Q. Very briefly, I believe your counsel elicited
9 some testimony regarding your making changes based on
10 requirements from Dell.

11 Do you recall that?

12 A. Yes.

13 Q. And I guess an example we saw at trial was a
14 letter about paint chips; is that right?

15 A. That's one of the things that we did.

16 Q. Okay. The paint chips -- isn't it true that
17 the paint chips were sent to you -- and it was an option
18 that you had to change to Dell gray, correct? It was
19 not a requirement.

20 A. No. Actually, Dell told me that -- at the
21 time I was making the product in black and that they
22 wanted it to be in Dell gray, because their workstations
23 were in Dell gray, and they didn't want it in black.

24 Q. Isn't it true that at that time, they -- Dell
25 actually changed all of its workstations to Dell gray at

1 that time, right?

2 A. I'm not sure when they changed.

3 Q. And that those paint samples were sent to all
4 of their vendors, given the option to change to Dell
5 gray if you wanted to try to attach to some of the Dell
6 sets? Isn't that what happened?

7 A. Oh, I don't know -- I don't know that they
8 changed at that time and that they sent it to all their
9 vendors.

10 Q. So it's your testimony that it was a
11 requirement that you change to Dell gray?

12 A. Yeah. They wanted us to be able to match
13 their workstation.

14 Q. Well, let me ask -- let me ask it a different
15 way --

16 A. Yeah.

17 Q. -- because I said the word requirement.
18 Did they require you to change to Dell gray to sell on
19 the website?

20 A. My understanding is that they wanted me --
21 that they wanted my product to match their color.

22 Q. The question is, did they require you to do
23 it? Did you have a choice to not change?

24 A. If I wanted to sell with Dell's product, I
25 didn't feel that I had a choice.

1 Q. And you realize that there are many, many
2 other products sold on Dell's website that are not Dell
3 gray, right?

4 A. I realize, but this is going with their
5 workstations, so -- directly with their workstations,
6 same as their own Dell branded product.

7 Q. Okay. Thanks.

8 MR. TYLER: Thank you, Your Honor.

9 THE COURT: All right. Anything further?

10 MR. NELSON: Just on this one point, just
11 a couple of questions, and we'll be done probably with
12 our case after that.

13 REDIRECT-EXAMINATION

14 BY MR. NELSON:

15 Q. You did, Mr. Moscovitch -- and this is just
16 from the jury testimony -- raise your prices to third
17 parties at Dell's request?

18 A. Yes.

19 Q. And you did build tooling at Dell's request?

20 A. I ramped up at their request, and I changed
21 the configuration of the product for shipping at their
22 request.

23 Q. And you -- and you made significant
24 investments in personnel and manufacturing and redesign
25 all at their request?

1	A.	Yes.
---	----	------

2 Q. And you traveled to Dell to meet with them
3 all at their request?

4	A. Yes.
---	---------

5 Q. And you absorbed significant expenses in
6 packaging and shipping at their request?

7	A. Yes.
---	---------

8	Q.	Okay.	Thanks.
---	----	-------	---------

9 THE COURT: Anything further of this
10 witness?

11 MR. NIEDERLUECKE: No, Your Honor.

12 MR. TYLER: No, Your Honor.

13 THE COURT: You may step down.

14 Who will be next?

15 MR. NIEDERLUECKE: Your Honor, actually,
16 we would -- we would like to call Jane Payfer to the
17 stand just to talk about this one --

18 THE COURT: All right.

19 MR. NIEDERLUECKE: -- website document.
20 We have the metadata for it, so I just want, as far as
21 the equitable issues here --

22 THE COURT: All right.

23 MR. NIEDERLUECKE: -- to address with her
24 that document.

25 | And, Your Honor, this is -- I don't know

1 if you want to give him the original or I can give him a
2 copy.

3 May I approach the witness, Your Honor?

4 THE COURT: Yes.

5 MR. NIEDERLUECKE: And I'd ask that 1471
6 be admitted.

7 THE COURT: Any objection?

8 MR. NELSON: No, no objection.

9 MR. TRIBBLE: No objection.

10 JANE PAYFER, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

11 DIRECT EXAMINATION

12 BY MR. NIEDERLUECKE:

13 Q. Ms. Payfer, you have Exhibit 1471 before you;
14 is that correct?

15 A. Yes, I do.

16 Q. And is this -- the second page of this
17 document, is that the Bloomberg document that we have
18 been addressing?

19 A. Yes, it is.

20 Q. Let's see. Let me back up here.

21 And this is -- is this the document that you
22 provided testimony on regarding when you had actually
23 found this file from the Internet?

24 A. Yes, it is.

25 Q. And did you testify that -- in the -- in the

1 jury part of the case, that you downloaded this in 2007?

2 A. Yes, I did.

3 Q. Okay. And the real question from Plaintiffs
4 was how that -- the date and time got on the bottom from
5 1997; is that correct?

6 A. That was the concern.

7 Q. After reviewing this document, is it still
8 your testimony that you downloaded this in 2007?

9 A. Yes, absolutely.

10 Q. Let's go back to the first page, if we can.

11 MR. NIEDERLUECKE: And for the record,
12 this is the metadata similar to what Defendants were
13 pulling up on the screen in the trial.

14 Q. (By Mr. Niederluecke) And do you see where it
15 lists in properties and, in fact, all over the document
16 the date of March 27th, 2007?

17 A. Yes, I do.

18 Q. Is that -- is that approximately when you
19 recall having downloaded that information?

20 A. Yes. I think I said it was the end of March
21 in 2007 in my testimony.

22 Q. Thank you.

23 MR. NIEDERLUECKE: I have no further
24 questions.

25 THE COURT: Cross?

1 MR. NIEDERLUECKE: Pass the witness.

2 CROSS-EXAMINATION

3 BY MR. TRIBBLE:

4 Q. Good morning.

5 A. Good morning.

6 Q. We just got this exhibit, so I guess I'll use
7 the document camera.

8 A. You've had the file since it was given to you
9 and the other documents.

10 Q. I just mean that --

11 MR. NIEDERLUECKE: He just means --

12 Q. (By Mr. Tribble) -- we had no notice of this
13 exhibit. We didn't even know you were going to be
14 called as a witness.

15 You'll agree -- you have the original
16 exhibit?

17 A. I do.

18 Q. You'll agree that Defendants' Exhibit 1471,
19 the -- the pictures we were talking about in trial, they
20 start on the second page, correct, the images of the
21 page?

22 A. Yes.

23 Q. You'll agree there's no Bates number at the
24 bottom of that page, is there?

25 A. The printout I have right now is the printout

1 attached to the metadata file, not the actual exhibit.

2 So the one I have doesn't have a Bates number.

3 Q. You'll agree that the document we were using
4 at trial has a Bates No. E001288, correct?

5 A. Yes.

6 Q. Do you have the metadata for this file, for
7 this document?

8 A. I don't have that metadata right now, no.

9 Q. The -- the -- this document -- copies of this
10 document were in several places. There were multiple
11 copies of this in the production of Ergotron.

12 Are you aware of that?

13 A. No, I'm not.

14 Q. Did you print out multiple copies of this
15 document and produce it multiple times?

16 A. I print -- I downloaded it from the Internet,
17 converted that file to a PDF, and included that in my
18 testimony.

19 Q. Was this metadata produced to us during the
20 litigation?

21 A. It's part of the digital file that was
22 produced to you during the litigation, yes, sir.

23 Q. Can you tell us what website -- we looked.
24 We couldn't find an archive site that has this page on
25 it. Can you tell us where you found it?

1 A. I cannot tell you that, and I also looked.
2 So I would confer that I -- the various sites that I
3 found, the link was not alive when I looked over the
4 weekend.

5 Q. So you've looked for this document to find
6 the archive again, and you can't find it?

7 A. That's true.

8 Q. Okay. Did you look at the metadata for the
9 other documents that were produced?

10 A. I did not.

11 Q. Did y'all go back and look at the original
12 production? Was this an -- in paper in Ergotron's
13 files?

14 A. I never saw it in paper in Ergotron's files.

15 Q. Well, that -- you printed it out in 2007.
16 That's what you say, correct?

17 A. Prior to 2007, I never saw it in paper in
18 Ergotron's files. I found this document on the Internet
19 and then went back to the Bloomberg site to confirm that
20 it actually happened in 1997.

21 Q. But my question is, the documents that we
22 got -- first of all, we only received TIFF images in the
23 document production.

24 Are you aware of that?

25 A. I'm not aware of all of that, no, sir.

1 Q. So the TIFF images didn't have any metadata
2 that would show us where the document came from; would
3 you agree with that?

4 A. I don't know how TIFF images metadata stacks
5 up, sir. I don't know that.

6 Q. Do you know what original files, file
7 folders, and file drawers, the multiple versions of
8 Plaintiff's Exhibit 358, came out of at Ergotron's
9 files?

10 A. I know that the file I submitted that was in
11 a marketing folder was the one I downloaded from the
12 Internet. That's what I know.

13 Q. And just so it's clear, you see the date and
14 the time at the bottom of the page.

15 A. I actually wanted the date and time on the
16 page, sir, yes.

17 Q. Why?

18 A. Because I was building a timeline to put the
19 whole progression of flat panel technology into a whole
20 market evolution story.

21 So I was building this timeline and having
22 quite a bit of confusion on which flat panel monitors
23 were available at different points in time, and this
24 document, sir, dated that for me.

25 MR. NIEDERLUECKE: I've got -- just

1 caution my witness, if it's trial preparation
2 information --

3 THE WITNESS: Trial preparation
4 information.

5 MR. NIEDERLUECKE: Yeah, and that's
6 privileged, so, Ms. Payfer, please don't disclose the
7 trial preparation information.

8 Q. (By Mr. Tribble) And so how -- so how -- how
9 did you get the date and time to print out because you
10 wanted it there?

11 A. The link that I found, I printed -- I believe
12 first -- I won't testify that I know every last step I
13 took. I believe I reviewed it. I believe I went back
14 to the Wayback machine and did find that same
15 information on the Bloomberg site.

16 And then I believe I converted it to a PDF
17 and saved it on our server where the document still
18 resides today. It's not missing.

19 Q. Did you produce that PDF in this litigation?

20 A. Absolutely, we did.

21 Q. We have a hard drive. Can you show us where?

22 A. Yes. I think I can.

23 Q. Well, are you saying you put terms into the
24 Wayback machine to do a search?

25 A. No. Once I found the document as a link on a

1 different site from Googling, then I went back to the
2 Bloomberg file to put Bloomberg's website in to confirm
3 that this was actually that website.

4 Q. Are you aware that you -- when you print
5 out -- I believe when you print out to paper or to a
6 file in the Wayback machine -- you're saying you got
7 this from the Wayback machine, correct?

8 A. No, I'm not. I'm saying I found it through
9 Googling.

10 Sir, at that point in time, respectfully, I
11 did not know there was a link between Mr. Moscovitch and
12 Bloomberg. I was just putting together a timeline.

13 Q. Do you recall the exhibits showing the same
14 web page printed out at different times and dates that
15 had the dates and times in the exact same position as
16 the --

17 A. Yes.

18 Q. -- the April 21 date --

19 A. All these pages have --

20 Q. Excuse me -- and time on Plaintiff's Exhibit
21 358?

22 You recall walking through those, correct, or
23 did you see me walk through those with the witness in
24 trial?

25 A. All the different pages of the document are

1 date stamped a different time. I understand that.
2 That's what happens when we take a printout, yes, I
3 understand that.

4 But I have a PDF of this moment in time from
5 a documentation perspective.

6 MR. TRIBBLE: Matt, do you have the PDFs
7 that we had for those exhibits? Do you have those?

8 Q. (By Mr. Tribble) You're aware that -- I mean,
9 the PDF -- you print to a PDF, and so that's when it
10 puts the time and date stamp on it. You're aware of
11 that, aren't you?

12 A. No, sir. What I found on the website already
13 had the time and date stamp and the pages numbered on
14 it. I then saved that file as another PDF on our
15 server.

16 MR. TRIBBLE: Your Honor, I don't have
17 any more questions, but we may have some further
18 argument about this.

19 THE COURT: All right. Thank you.
20 Anything further?

21 MR. NIEDERLUECKE: Nothing further, Your
22 Honor.

23 THE COURT: All right. You may step
24 down.

25 All right. Who's next?

1 MR. NIEDERLUECKE: Your Honor, next, if
2 we could, I'd like to read in just two very short
3 statements from Mr. Roarty and Mr. Duffy from their
4 depositions, and this just goes to the preservation of
5 that -- the evidence, and it just relates to the file.
6 So, Your Honor, first, I will -- I will read the
7 designations from Edward Duffy in his deposition.

8 QUESTION: Could you state your name?

9 THE COURT: What page -- what page and
10 line?

11 MR. NIEDERLUECKE: Oh, I'm sorry.
12 Page 9, Line 6.

13 QUESTION: Could you state your full --
14 your name -- full name for the record.

15 ANSWER: Edward Duffy.

16 MR. NIEDERLUECKE: Page 10, Line 4.

17 QUESTION: And you used to work for
18 Bloomberg?

19 ANSWER: Yes.

20 MR. NIEDERLUECKE: Page 16, Line 14.

21 QUESTION: Were you ever involved in the
22 manufacture process for display systems for Bloomberg?

23 ANSWER: Yes.

24 QUESTION: When did you first become
25 involved in that?

1 ANSWER: Well, at some point after
2 joining the company, and I don't remember specific
3 dates, but Susan invited me to become active in a
4 display project that they had underway.

5 And that project was a twin-headed
6 15-inch CRT product developed in one contiguous plastic
7 skin. And at that point, that's when I became involved
8 in the displays.

9 MR. NIEDERLUECKE: And then Page 127,
10 Line 24.

11 QUESTION: You were asked if you have any
12 documents relating to the subject of your testimony
13 today, and you said you didn't; is that right?

14 | ANSWER: Yes.

15 QUESTION: And why don't you personally
16 have any documents?

17 ANSWER: I'm no longer with the firm. I
18 wouldn't have any reason to have any.

19 QUESTION: Would you have had documents
20 when you were with the firm?

21 | ANSWER: Certainly.

22 QUESTION: And when did you leave the
23 firm?

24 ANSWER: June of '01.

25 | QUESTION: So had this issue arisen prior

1 to you leaving the firm, do you -- do you believe you
2 may have additional evidence -- or may have had
3 additional evidence that you could have brought to the
4 table today?

5 ANSWER: Absolutely.

6 MR. NIEDERLUECKE: And then Mr. Roarty's
7 deposition testimony next. And his testimony begins on
8 Page 11, Line 25.

9 QUESTION: And, Mr. Roarty, where do you
10 work?

11 ANSWER: I work for Bloomberg.

12 QUESTION: And how long have you worked
13 at Bloomberg?

14 ANSWER: Twenty years.

15 MR. NIEDERLUECKE: On Page 136.

16 QUESTION: Mr. Roarty, before we get into
17 this next exhibit, did you make any documentation of
18 your ball and socket or telescoping arm ideas?

19 ANSWER: I believe I had sketched it in a
20 notebook.

21 QUESTION: The notebook you kept as part
22 of your work at Bloomberg?

23 ANSWER: Yes.

24 QUESTION: And were you able to locate
25 that notebook?

1 ANSWER: No.

2 QUESTION: Do you know what happened with
3 that notebook?

4 ANSWER: I moved to England in 2001 for a
5 work assignment, and I lost a number of notebooks and
6 desk items. I'm not sure what happened to them.

7 QUESTION: When in 2001 did you move?

8 ANSWER: It was August 24th, 2001.

9 MR. NIEDERLUECKE: And that's the end of
10 Mr. Roarty's testimony.

11 THE COURT: All right.

12 MR. NIEDERLUECKE: Next we have the
13 testimony of Allen Tameshtit, who is the -- if you
14 recall, the Mass -- I believe his title was the current
15 director of intellectual property or a similar title.
16 We've got a clip -- I think two clips from each of the
17 depositions. I think it goes about 14 minutes, Your
18 Honor.

19 THE COURT: All right.

20 (Video playing.)

21 QUESTION: Now, is it correct that Mass
22 had a prior art search completed in preparation for
23 filing an application for the '939 patent?

24 ANSWER: We're unsure if there was a
25 patent search done or not.

1 QUESTION: What systems was Mass aware of
2 that allowed for horizontal registration prior to filing
3 of the application for the '939 patent?

4 ANSWER: Two CRTs sitting on a desk.

5 QUESTION: And other than the statement
6 in the background of the invention, Mr. -- or Mass did
7 not disclose to the Patent Office, during the
8 prosecution of the '939 patent, any system where two
9 CRTs were sitting on a desk, correct?

10 ANSWER: Again, we briefly spoke about
11 whether or not statements like that appear anywhere else
12 in the patent. I'm not certain that they don't appear
13 anywhere else. I'd have to look over it very carefully
14 to determine that.

15 QUESTION: But you're not aware, as you
16 sit here today, other than reading the patent for what
17 it states, that there's any further disclosure?

18 ANSWER: I'm not aware right now, no.

19 QUESTION: Mr. Tameshtit, I'm going to
20 hand you what's been marked -- previously marked as
21 Exhibit 13. Can you tell me what Exhibit 13 is?

22 ANSWER: Well, from what appears on the
23 face, it appears to be a fax transmission from Bloomberg
24 Financial Markets Commodities News to Jerry Moscovitch
25 from Mr. Sean Roarty from Bloomberg, LP.

1 QUESTION: And this attaches a page
2 identified as Bloomberg Financial Markets Commodities
3 News, Shapes and Sizes, correct? If you look at the
4 second page.

5 ANSWER: That's what it says at the top,
6 yes.

7 QUESTION: You see at the bottom right,
8 that's dated July 1994, U.S.

9 ANSWER: At the bottom, it says 7/94 U.S.

10 QUESTION: Do you know whether this
11 document was in Mass' files?

12 ANSWER: I believe it was provided by
13 Mass to you.

14 QUESTION: And the date of this fax from
15 Bloomberg to Jerry Moscovitch was October 12, 1994,
16 correct?

17 ANSWER: 10/12/94.

18 QUESTION: Was that monitor, the
19 Bloomberg flat panel, disclosed to the United States
20 Patent & Trademark Office as part of the '978 reissue
21 application?

22 MR. SCHLATHER: Object to form.

23 ANSWER: No.

24 QUESTION: Why not?

25 MR. SCHLATHER: Object to form.

1 ANSWER: There was no need to.

2 QUESTION: So looking at this document,
3 it wouldn't be your understanding that this is a
4 document that was a public document produced in July of
5 '94 in the United States from Bloomberg, L.P.?

6 ANSWER: I can't say one way or another.
7 I don't know.

8 QUESTION: With your experience as a
9 patent agent --

10 ANSWER: Uh-huh.

11 QUESTION: -- should this document have
12 been provided to the United States Patent & Trademark
13 Office as part of the '939 application?

14 ANSWER: Mass' position is that this is
15 nonmaterial to patentability.

16 QUESTION: Let's turn to Exhibit 5, if we
17 could, which is the '978 reissue application.

18 In the '978 reissue application, Mass
19 provided the Patent Office with an IDS, correct?

20 ANSWER: In the '978, yes.

21 QUESTION: Isn't it correct that the only
22 three prior art patents that were disclosed were the
23 same three that the Patent Office previously disclosed
24 to Mass in the '939 application?

25 ANSWER: At what point?

1 QUESTION: Oh. Thank you.

2 At the time of January -- at the time of
3 this filing, January 13th, 1999, of the IDS, the only
4 three patents listed on this IDS were the three patents
5 that the prior -- that the Patent Office itself had
6 disclosed to Mass.

7 ANSWER: I believe that's correct.

8 QUESTION: And, in fact, Mass filed a
9 supplemental IDS, correct?

10 ANSWER: Do you know the Bates number for
11 that?

12 QUESTION: M3083, I believe.

13 ANSWER: Yes.

14 QUESTION: How did Mass learn of the
15 patents that are identified in the supplemental IDS
16 disclosure?

17 ANSWER: Mass received a copy of a letter
18 that Mr. Waraksa had sent to the Law Society of Upper
19 Canada, which included those patents.

20 QUESTION: Mr. Waraksa believed that you
21 could not obtain claims as broad as what were ultimately
22 claimed in the reissue, correct?

23 ANSWER: I think the record shows that
24 Mr. Waraksa believed that a concept as simple as turning
25 two displays towards each other was not patentable.

1 QUESTION: But my question is the first
2 opinion. He decided -- he decided that Mass couldn't
3 get broader claims at the time he filed this
4 application, the '939 application.

5 ANSWER: Yeah. So if this helps, in the
6 declaration at Point 6, the last line, it says, I relied
7 on Mr. Waraksa's professional judgment that a claim of
8 the scope as claim -- I think that's 16, not 6 -- above
9 was not patentable in view of the prior art that
10 Mr. Waraksa and I reviewed prior to preparing and filing
11 the '158 application.

12 QUESTION: And just for the record, we're
13 in Exhibit 5.

14 The Patent Office rejected initially the
15 reissue claims on the basis of -- at least Claim 16, I
16 should say, on the basis of the Robak patent, correct?

17 ANSWER: Correct.

18 QUESTION: And that Robak patent was one
19 of those three patents that were identified by the
20 Patent Office in the '939 application, correct?

21 ANSWER: Correct.

22 QUESTION: Do you know if that was the
23 patent that Mr. Waraksa showed to Jerry to make his
24 point about the scope of the patent claims?

25 ANSWER: No.

1 QUESTION: You don't know, or it wasn't?

2 ANSWER: I'm not certain if that was the
3 one.

4 QUESTION: Based on this rejection on
5 June 2nd, 1999, relying on the Robak design patent --

6 ANSWER: Yes.

7 QUESTION: -- did Mass do any further
8 investigation beyond examining the patent itself?

9 MR. SCHLATHER: Object to form.

10 ANSWER: By investigation, you mean what?

11 QUESTION: Did they -- did they search
12 for any other related art to the Robak design patent?

13 ANSWER: I believe it's Mass' position
14 that Jerry Moscovitch, Mass, did not do a patent search
15 during the time of that prosecution.

16 QUESTION: And did he do any other
17 informal investigation relating to art that may have
18 existed prior to the filing of the '939 application?

19 MR. SCHLATHER: Objection to form.

20 ANSWER: I don't know.

21 QUESTION: So to your knowledge, as the
22 representative of Mass, you're not aware of any other
23 investigations that were done?

24 ANSWER: I'm unaware of any
25 investigations that were done, yes.

1 (End of video clip.)

2 MR. NIEDERLUECKE: Your Honor, then we
3 have one shorter clip here.

4 MR. NELSON: Can we just -- oh, I'm
5 sorry. We have a couple of counters.

6 And then, Your Honor, can we just state
7 for the record, for what it's worth, there --
8 Mr. Tameshtit was the 30(b)(6) designee on the file
9 history.

10 There were a few questions that went
11 beyond that. We don't particularly object, obviously,
12 to Mr. Tameshtit's testimony, but we just point that out
13 for the record, that some of it is not actually
14 corporate testimony.

15 We also have a very short, like
16 30-second, counterdesignation.

17 MR. NIEDERLUECKE: Do you want to play
18 that one, and then we'll play our second volume?

19 MR. NELSON: Oh.

20 MR. NIEDERLUECKE: We have a second
21 volume. Either way.

22 MR. NELSON: We'll do it all at the end.

23 MR. NIEDERLUECKE: Okay. In the second
24 one, this is him in his individual capacity.

25 THE COURT: All right.

1 (Video playing.)

2 QUESTION: Mr. Tameshtit, I'm going to
3 hand you what's been marked as Tameshtit Exhibit 4. Can
4 you tell me what this document is?

5 ANSWER: It's a Letter of Acknowledgments
6 and Agreement.

7 QUESTION: And who is it between?

8 ANSWER: Mass Engineer Design and Jerry
9 Moscovitch on the one hand, and myself, Alan Tameshtit.

10 QUESTION: Is it your understanding that
11 this agreement obligates Mr. Moscovitch to certain
12 payment of compensation based on the results of the
13 lawsuit to you?

14 ANSWER: Yes.

15 QUESTION: And, in fact, this lawsuit
16 that we're currently in and the results of that lawsuit,
17 under your agreement, has a significant contribution to
18 your potential overall compensation, doesn't it?

19 ANSWER: Potentially.

20 QUESTION: You have a financial
21 incentive?

22 ANSWER: Yes.

23 QUESTION: And this was -- this agreement
24 was designed to give you that financial incentive with
25 regard to the litigation, correct?

1 ANSWER: I imagine so. I can't get into
2 Jerry's head, but that's what I would assume.

3 QUESTION: When you were brought on as a
4 consultant in June of 2005, was Mass contemplating --
5 contemplating this lawsuit?

6 ANSWER: I don't recall if, at the time
7 that I started in June 2005, Mass was contemplating the
8 lawsuit.

9 QUESTION: So you didn't have any
10 discussions, as the potential director of intellectual
11 property for Mass, as to whether or not it was going to
12 enforce the '978 patent against Ergotron or others?

13 ANSWER: I don't remember any specific
14 conversations about that when I started in June 2005.

15 QUESTION: Did Mr. Moscovitch discuss
16 with you about how long he had contemplated potentially
17 suing to enforce the '978 patent?

18 ANSWER: In a verbal conversation, you
19 mean, or --

20 QUESTION: Either verbally or in written
21 communications.

22 ANSWER: Well, I came to know that there
23 had been a letter sent to Ergotron, for example, in the
24 early 2000s, 2001, I believe it was. I think that's a
25 record that's been produced.

1 QUESTION: Did you learn that as a result
2 of this -- of the actual litigation, or did you know
3 that prior to filing the litigation?

4 ANSWER: I believe I knew that prior to
5 filing the litigation.

6 QUESTION: But in terms of actions taken
7 by Mass to prepare for litigation prior to engaging
8 counsel, are you aware from Mr. Moscovitch whether he or
9 his -- or Mass had done other work to prepare for the
10 litigation?

11 ANSWER: Not much. Again, I knew that he
12 sent out that letter, which indicates there was some
13 preparation in preparing that letter, obviously, but not
14 much else. That was before my time.

15 QUESTION: Do you have any understanding
16 why Mass waited until July of 2006 to actually file this
17 lawsuit?

18 ANSWER: I don't know all the details
19 about what went into Jerry's decision-making process.

20 QUESTION: Well, do you have -- do you
21 have any knowledge about why Mass waited until July of
22 2006?

23 ANSWER: I believe one reason was that
24 Dell was a customer of Mass, and Mass was interested in
25 doing well with Dell, and obviously, a litigation would

1 not have furthered that cause.

2 QUESTION: You were working full time
3 from October 1, 2005, correct?

4 ANSWER: Correct.

5 QUESTION: And that was prior to your
6 knowledge that there may be a lawsuit to enforce the
7 '978 patent, correct?

8 ANSWER: In any level of seriousness,
9 yeah. Again, I was aware of some letters that had been
10 exchanged in 2001, but as I mentioned earlier, there was
11 no serious discussion of a lawsuit until a few months --
12 until we engaged our lawyers.

13 (End of video clip.)

14 MR. NELSON: Your Honor, we don't --
15 we're not actually going to play any of the Tameshtit
16 counters. That's fine.

17 Can I read one thing in the record for
18 Roarty really quickly?

19 MR. NIEDERLUECKE: Sure.

20 MR. NELSON: This is -- this was in the
21 jury, but just so Your Honor has it, this is the Roarty
22 deposition. It's Page 24, Line 17, the questioning by
23 Mr. Niederluecke.

24 QUESTION: Since there's only
25 100-something pages, if we would have asked you for

1 documents in 2001, would Bloomberg have had documents
2 that since then, it has discarded?

3 MR. NELSON: And this says Page 24, Line
4 22 and 23.

5 ANSWER: Again, I don't know of any. I
6 don't know.

7 THE COURT: Thank you.

8 MR. NIEDERLUECKE: Your Honor, next --

9 THE COURT: Yes.

10 MR. NIEDERLUECKE: The two that Ergotron
11 has left are Mirek Waraksa and Mark Elchuk. We were
12 just talking with counsel. I know we're running a
13 little late. There's a number of objections that have
14 been placed regarding the testimony.

15 If the Court is willing to do this, we
16 respectfully request that we can provide you at least
17 with a book that has it designated and highlighted, and
18 you can have the objections, and then I think they were
19 going to provide you -- there is a little -- there is a
20 video for a portion of it. They will provide you a
21 video.

22 THE COURT: I would prefer to finish all
23 the evidence today.

24 MR. TRIBBLE: That's fine, Your Honor.

25 What he's saying, though, is that the --

1 for the Elchuk deposition, you've already excluded that,
2 and Mr. Nelson can speak to that.

3 But for -- as to Waraksa, if you want to
4 see our video, they don't have a video of the first part
5 of theirs, and so it would be a matter of reading it
6 into the record.

7 We're happy to proceed however the --

8 THE COURT: How long is it?

9 MR. NIEDERLUECKE: Each one is probably
10 going to be about 20 minutes of reading, Your Honor.

11 THE COURT: All right. Is it something
12 that you think is germane to my decision, that I need to
13 hear?

14 MR. NIEDERLUECKE: You mean in terms of
15 summarizing it or --

16 THE COURT: Well, in terms of making the
17 decision that -- decisions that you're asking me to
18 make.

19 MR. NIEDERLUECKE: Oh. Well, we
20 designated what we think was germane. It had to do with
21 the -- these are, obviously, the two patent attorneys
22 that were involved --

23 THE COURT: Okay. Well, let's read it
24 in, because I want to hear all this and -- how much more
25 do we have? Are we going to be able to be through by

1 12:00?

2 I mean, I don't mind hearing it, but --
3 okay. You're going to have 20 minutes of depositions,
4 right?

5 MR. NIEDERLUECKE: No. I think it's 20
6 for each one, Your Honor.

7 THE COURT: So you're talking about 40
8 minutes.

9 MR. NIEDERLUECKE: Yeah.

10 THE COURT: All right. And --

11 MR. NIEDERLUECKE: And then Dell has
12 some.

13 THE COURT: And then how much --

14 MR. REED: We have just under 20 minutes
15 total of depositions as well, Your Honor.

16 THE COURT: Okay. So that's an hour.
17 And how much do y'all have?

18 MR. NELSON: I think, to the extent it's
19 necessary, and we don't think it's relevant at all, we
20 have eight minutes video of Waraksa and maybe a minute
21 or two from -- to counter on Dell's and others.

22 But would you like -- can we discuss the
23 Elchuk testimony?

24 THE COURT: Yeah, let's deal with that.

25 MR. NELSON: And, Your Honor, at the

1 bench conference during trial, you had ruled that
2 Mr. Elchuk's testimony would be excluded, because
3 what -- they are using his deposition testimony, again,
4 as an expert to try to establish the fact that -- you
5 know, what the claims do and do not have on -- I'm
6 sorry -- the prior art does and does not have where he
7 wasn't involved in the prior art.

8 And, yeah, he's certainly not a person of
9 ordinary skill. So -- and we would just ask to continue
10 that ruling from the floor and to exclude the testimony,
11 because it relates to the fact that they're using it for
12 expert opinion, and he's not an expert.

13 MR. NIEDERLUECKE: Well, first of all,
14 we're not using it for expert opinion.

15 Secondly, this is the patent attorney
16 that prosecuted this. One of the questions, obviously,
17 is what was disclosed to him; what did he do with it;
18 what did he understand; if it had been disclosed to him,
19 would he have disclosed it to the Patent Office and
20 whether or not he would have felt it was material and
21 had disclosed it had Jerry Moscovitch disclosed it to
22 him.

23 THE COURT: All right. Your objection is
24 noted. I will -- you don't need to put that one on
25 today. I will read it, and in all of my wisdom and

1 ability siphon out the part that's expert and only
2 consider the other part.

3 MR. NIEDERLUECKE: And, Your Honor, if
4 you'd like, we could even include their specific
5 objections. We have a list of those in a booklet.

6 THE COURT: That will be fine. Okay.
7 All right.

8 MR. NIEDERLUECKE: You know, similarly,
9 Mirek Waraksa is the same thing, talking about the
10 prosecution.

11 And would you like to hear that, or would
12 you like to take that evidence in the same manner?

13 THE COURT: Well, why don't you summarize
14 it for me, and then I'll -- I'll read it. But you just
15 summarize the top four or five points that you think the
16 testimony makes.

17 MR. NIEDERLUECKE: Well, I think with
18 Mr. Waraksa, Your Honor, the main points are that
19 Mr. Waraksa's testimony is that he did not make a
20 mistake in the -- seeking the prosecution of this
21 original patent; that the idea of booking was never
22 disclosed to him by Mr. Moscovitch when he started; and
23 that the booking issue came up only after Mr. Moscovitch
24 had -- after they had gotten to the notice of allowance
25 that Mr. Moscovitch had seen commercial products in the

1 market, and that's when that issue came up.

2 And then they proceeded to file the
3 patent rather than do anything else with it. I mean --
4 I'm sorry -- the procedure allowed it to issue rather
5 than doing anything with it.

6 And then there's testimony regarding
7 these documents that you've heard of in this case, Your
8 Honor, that goes to the letters that were sent back and
9 forth and Mr. Moscovitch's knowledge of what
10 Mr. Waraksa's position was as to whether or not there
11 was a mistake that was made.

12 And then those would then relate to
13 Mr. Moscovitch's statement to the -- to the Patent
14 Office regarding that both he and Mr. Waraksa understood
15 that an error had occurred.

16 Then, finally, there's testimony
17 regarding the art and what was or was not disclosed to
18 him, and the testimony would be that the only thing --
19 Mr. Waraksa's testimony is that -- in fact, I think it
20 is that he actually was the one who thought I've seen
21 these two CRTs by each other, and that actually was
22 something he had told Mr. Moscovitch.

23 And then we go through addressing with
24 him what was or wasn't disclosed essentially during this
25 period of the original prosecution of the '939. You

1 know, no disclosures were made of prior art.

2 And so there's testimony on that, and
3 then there's testimony about the actual Bloomberg
4 information and whether or not, if he had received that,
5 he would have disclosed that to the Patent Office.

6 So that's, in a nutshell, what --

7 THE COURT: Do you have that testimony --

8 MR. NIEDERLUECKE: Yes, I do.

9 THE COURT: -- that I can put in my hand
10 where I can be sure I can find it?

11 And let me see other testimony that Dell
12 was wanting to offer. Do you have that where I can take
13 that with me today, too?

14 MR. NIEDERLUECKE: I do not have Dell. I
15 don't know if Dell has it.

16 MR. REED: What we have, Your Honor, is
17 we have not the entire transcript highlighted, but
18 rather just those portions that we were going to play.
19 We call them clips, and we've been exchanging these back
20 and forth with everybody, so it's --

21 THE COURT: Okay. How am I going to read
22 that or see that?

23 MR. REED: We had intended to play it by
24 video, Your Honor.

25 MR. TYLER: You can also take it on a

1 DVD, if you want to take it that way.

2 THE COURT: Okay. Let me have it on DVD,
3 if you would.

4 MR. NIEDERLUECKE: And, Your Honor, I'll
5 give you -- and then, Your Honor, with regard to
6 Mr. Elchuk, that testimony, obviously, doesn't deal with
7 the Waraksa issues, but it deals with the same type of
8 information about what he knew, what was disclosed to
9 him, and then the art and what he would have done with
10 it if he had disclosed it.

11 THE COURT: Do you have that in that
12 notebook?

13 MR. NIEDERLUECKE: Yes. This is all in
14 the notebook.

15 THE COURT: Okay. All right. Thank you.

16 MR. NIEDERLUECKE: And I have -- the
17 objections are in the front there for you.

18 THE COURT: All right. Very well.

19 MR. NELSON: Can I have a brief response
20 on Mr. Waraksa?

21 THE COURT: Yes, certainly. And you can
22 play your clip, if you wish to.

23 MR. NELSON: Okay. We'll go ahead and
24 play the clip, but I -- I don't know if it's in the clip
25 or not, Your Honor, but one thing that's not in the clip

1 is that -- what came out through the notes is that there
2 was -- we would ask to actually -- before we play it, we
3 would ask that Mr. Waraksa be excluded in its entirety
4 due to the conversations that defense counsel had with
5 Mr. Waraksa beforehand.

6 And as Your Honor is aware, there are
7 assurances from two defense counsel that they didn't
8 discuss these divisional patents, and in fact, the notes
9 clearly reveal that they did talk about divisional
10 patents.

11 In addition, Mr. Waraksa said -- I asked
12 him at the deposition that -- whether he -- they spoke
13 about this conversation at the zoo, which was related to
14 the divisional patents, and Mr. Waraksa said no, he did
15 not talk about the zoo.

16 All over their notes, when talking
17 about -- in the defense notes are conversations about
18 talking at the zoo. They're actually -- it says the zoo
19 on their notes, and it's -- all over the face of it, it
20 says divisional patents.

21 And this is despite both -- two lawyers
22 from the defense saying specifically, I didn't talk
23 about these divisional patents.

24 So we would ask that it be excluded
25 before we play -- we're happy to play the tape.

1 Briefly, Your Honor, it basically
2 establishes that Mr. Waraksa lied about his name and the
3 fact that he had been disbarred by the Canadian Bar
4 Association, that he didn't tell Jerry about that and
5 that despite all this -- and this is the key point for
6 this defective reissue, Your Honor.

7 The legal standard for whether a reissue
8 is proper is whether the lawyer failed to appreciate the
9 scope of the claims, and that's what we show with
10 Mr. Moscovitch. Despite all that, even Mr. Waraksa said
11 that he, quote, failed to appreciate the scope of the
12 claims.

13 THE COURT: Okay. You may play your
14 clip.

15 MR. NELSON: Okay.

16 THE COURT: How long is it?

17 MR. NELSON: How long is it? Five
18 minutes.

19 MR. TRIBBLE: Your Honor, we can give you
20 a DVD. It's 15 minutes. We'll be happy to play it for
21 you.

22 THE COURT: Well, what else do we have
23 after this?

24 MR. TYLER: I think that's it. And
25 actually, we do have a problem with one of our DVDs.

1 Actually, our AV person, his mom did pass away last
2 night, so we had to get somebody else in, and we don't
3 know -- we know we have some of the DVDs, but we're not
4 sure if we have them all.

5 So I don't know if maybe we can get them
6 to you later today and have them taken over to your
7 office perhaps.

8 MR. TRIBBLE: We've agreed to cut those
9 clips for them, Your Honor, and put them on a DVD.

10 THE COURT: Okay.

11 MR. TYLER: We can just get them over to
12 his office later on today or --

13 MR. TRIBBLE: Maybe I can get Charlie
14 Ainsworth or somebody to bring that by.

15 THE COURT: Okay. That will be fine.
16 Just get them back to me today.

17 All right. You may proceed with your
18 clip.

19 MR. TYLER: And then we have a trial
20 brief to go along with those DVD clips. Those are
21 referencing testimony that we already heard on the
22 stand --

23 THE COURT: All right.

24 MR. TYLER: -- if that's acceptable to
25 the Court.

1 THE COURT: All right.

2 MR. NELSON: We would object to that or
3 at least put a -- we haven't seen these briefs, and to
4 the -- we don't want to be able to paper on this.

5 THE COURT: Well, I think we're going to
6 need a briefing schedule on this.

7 MR. NELSON: Okay.

8 THE COURT: So why don't y'all get
9 together. You need to confer, submit me an agreed-upon
10 order to get me briefs within, say, the next week to 10
11 days.

12 MR. TYLER: That's great, Your Honor.

13 MR. NIEDERLUECKE: Thank you, Your Honor.

14 THE COURT: First brief response,
15 replies, et cetera, okay?

16 All right. You may proceed.

17 (Video playing.)

18 QUESTION: The other side, the
19 Defendants, are paying you for your time today?

20 ANSWER: Yes.

21 QUESTION: \$300 an hour; is that right?

22 ANSWER: Yes.

23 QUESTION: Let me repeat this question,
24 sir: You are currently suspended from the practice of
25 law in Canada; is that right?

1 ANSWER: Yes, I am.

2 QUESTION: You have been suspended from
3 the practice of law since when?

4 ANSWER: '99. I'm not very certain, but
5 around 1999 or 2000.

6 QUESTION: You cannot practice law today
7 in Canada; is that right?

8 ANSWER: That's correct.

9 QUESTION: Do you recall Defendants'
10 lawyer, Mr. Niederluecke, questioning you about whether
11 you were a United States patent agent?

12 ANSWER: Yes.

13 QUESTION: You said that you were?

14 ANSWER: Yes.

15 QUESTION: You said that you have been a
16 United States patent agent for approximately 28 years;
17 is that right?

18 ANSWER: Roughly, yes.

19 QUESTION: You have been suspended from
20 practice from the United States Patent & Trademark
21 Office, haven't you, sir, at one point during that
22 period?

23 ATTORNEY: Objection, form.

24 ANSWER: Yes.

25 QUESTION: You were suspended from

1 practice in 2003; isn't that right?

2 ANSWER: That may be correct.

3 QUESTION: You were suspended from
4 practice for two years; isn't that right?

5 ANSWER: I'm not certain.

6 QUESTION: When Jerry hired you, you
7 understood that it was based on the solicitor/client
8 relationship in Canada; isn't that right?

9 ANSWER: Yes, I guess, and as a U.S.
10 patent agent.

11 QUESTION: Mr. Waraksa, you testified
12 earlier that your full name is Mirek E. Waraksa; is that
13 right?

14 ANSWER: A.

15 QUESTION: Mirek A. Waraksa is your full
16 name?

17 ANSWER: That's the name I go by, yes.

18 QUESTION: I'm sorry. You stated under
19 oath that was your full name, didn't you?

20 ANSWER: Yes.

21 ATTORNEY: Objection to form.

22 QUESTION: Is that really your full name?

23 ANSWER: Well, it's the same as Jim is to
24 James.

25 QUESTION: I'm sorry. Is Mirek Waraksa

1 your full name?

2 ANSWER: Legal name is Miroslaw, which is
3 M-I-R-O-S-L-A-W.

4 QUESTION: When you were asked what your
5 full name was before, you did not tell your full name;
6 isn't that right?

7 ANSWER: No. I told you the name I go
8 under.

9 QUESTION: Sir, you were asked what your
10 full name was, correct?

11 ANSWER: Yes.

12 QUESTION: You did not tell counsel your
13 full name, did you?

14 ANSWER: I did not.

15 QUESTION: Mirek Waraksa is not your
16 legal name, is it?

17 ANSWER: Technically, in Canada, it is.

18 QUESTION: You go by Mirek Waraksa as
19 your -- I'm sorry. You go by Mirek Waraksa as your
20 legal name in Canada?

21 ANSWER: Yes.

22 QUESTION: Did you go by Mirek Waraksa
23 when you were registered as a solicitor in Canada?

24 ANSWER: Yes. That's actually the only
25 name I've ever used.

1 QUESTION: Mr. Waraksa, this is a
2 complaint against you from the Law Society of Upper
3 Canada, is it not?

4 ANSWER: Well, that was -- I haven't seen
5 this before.

6 QUESTION: Mr. Waraksa, could you please
7 turn to Page 4 of this document?

8 ANSWER: Yes.

9 QUESTION: Do you see it says: To
10 Miroslaw Antoni Waraksa, barrister and solicitor?

11 ANSWER: Yes.

12 QUESTION: That is you, isn't it?

13 ANSWER: That's me.

14 QUESTION: This is a complaint about you
15 from the Law Society, is it not?

16 ANSWER: It's a complaint about me. I'm
17 not certain what the complaint is.

18 QUESTION: Mr. Waraksa, what name do they
19 use on this document?

20 ANSWER: Miroslaw.

21 QUESTION: Mr. Waraksa, the conduct for
22 which you are accused of professional misconduct
23 occurred in 1996; isn't that right?

24 ANSWER: I believe so.

25 QUESTION: 1996 was the same time that

1 you were preparing and filing Mr. Moscovitch's patent
2 application, correct?

3 ANSWER: That's correct.

4 QUESTION: You never told Mr. Moscovitch
5 that, did you?

6 ANSWER: No.

7 QUESTION: Mr. Waraksa, during the time
8 that you were preparing and filing Mr. Moscovitch's
9 applications, you were on antipsychotic medication;
10 isn't that right?

11 ANSWER: No, that's not true.

12 QUESTION: Were you on any medication?

13 ANSWER: Yes, I was.

14 QUESTION: Please read for me the first
15 three sentences of the second paragraph.

16 ANSWER: Mr. Moscovitch is correct
17 regarding my health problems. I, apparently, suffer
18 from a chemical imbalance that causes mood swings, and
19 I've experienced bouts of depression during which my
20 ability to work has been impaired.

21 QUESTION: Next sentence, please.

22 ANSWER: My doctor is still searching for
23 a combination of drugs that will control my mood swings.

24 QUESTION: Thank you.

25 Did your doctor ever find a correct

1 combination of drugs to control your mood disorder?

2 ANSWER: Yes, he did.

3 QUESTION: When did he do that?

4 ANSWER: Two years ago.

5 QUESTION: From 1990 -- excuse me. Let
6 me back up.

7 When did your mood problems and mental
8 health start to deteriorate?

9 ANSWER: Sometime in the early '90s.

10 QUESTION: Did you tell Mr. Moscovitch
11 that you were having mental health problems?

12 ANSWER: Yes, I did, yes.

13 QUESTION: What specifically did you talk
14 about to the Defendants two months ago in Toronto at
15 your house?

16 ANSWER: What it was that I was trying to
17 protect with the '939 patent application.

18 QUESTION: Mr. Waraksa, as you sit here
19 today, what is your recollection of what happened at
20 that meeting?

21 ANSWER: We discussed the scope of the
22 protection available for the invention.

23 QUESTION: What else did you talk about?

24 ANSWER: That's about it.

25 QUESTION: You talked about that for an

1 hour?

2 ANSWER: Yes.

3 QUESTION: Did you talk about the zoo?

4 ANSWER: I don't think I mentioned the
5 zoo.

6 QUESTION: You didn't mention the zoo at
7 all?

8 ANSWER: No.

9 QUESTION: Mr. Waraksa, this is a patent
10 disclosure about the dual LCD unit, correct?

11 ANSWER: I'm not familiar with this
12 document.

13 QUESTION: Sir, do you see on the upper
14 right, it says August 25th, 1995?

15 ANSWER: Yes. August 25, 1995.

16 QUESTION: Your testimony, sir, is that
17 you don't -- despite being in a patent disclosure, you
18 don't recall any testimony about there being a
19 ball-and-socket joint for --

20 ANSWER: No.

21 QUESTION: -- independent tilt and
22 swivel?

23 ANSWER: No, sir. That's not what I'm
24 saying. I'm saying that wasn't a particular feature
25 that should be patented.

1 QUESTION: You did talk about it?

2 ANSWER: I can scarcely remember, but,
3 yes, we did talk about a ball-and-socket joint being
4 there, yes.

5 QUESTION: And the independent tilt and
6 swivel of the LCD?

7 ANSWER: Yes.

8 QUESTION: Sir, can you please turn to
9 Exhibit 11?

10 ANSWER: Yes.

11 QUESTION: Sir, I'm going to turn your
12 attention to Paragraph 6, the first sentence.

13 Sir, do you recall your testimony earlier
14 that you were not sure whether this testimony was or was
15 not true -- or this statement was or was not true?

16 ANSWER: At the time, we believed that
17 the claims were proper scope.

18 QUESTION: Yes, sir.

19 ANSWER: Yes.

20 QUESTION: And assuming that the reissue
21 patent issued, which it did, that would mean that
22 reissue coverage was available broader than that in
23 scope, correct?

24 ANSWER: Different scope, yes.

25 QUESTION: Yes, sir.

1 So assuming that it was unnecessarily
2 limited, you would agree that you failed to appreciate
3 that you could get broader coverage in 1995 and 1996,
4 correct?

5 ANSWER: I -- I didn't see the
6 possibility of getting broader coverage, no.

7 QUESTION: You didn't see the
8 possibility. That's correct. You didn't see the
9 possibility of that.

10 ANSWER: I never considered it.

11 QUESTION: You failed to appreciate it,
12 right?

13 ANSWER: No, I never considered it.
14 There's a difference. Mr. Moscovitch asked me to patent
15 a horizontal and vertical positioning apparatus, and
16 that's what I went for.

17 QUESTION: Sir, will you listen to my
18 question?

19 Assuming that he got broader coverage
20 than the original patent --

21 ANSWER: Yes.

22 QUESTION: -- that would suggest that the
23 first patent was unnecessarily limited, correct?

24 ANSWER: It had a different scope.

25 QUESTION: Whether you overlooked it or

1 whether you didn't consider it or for whatever reason,
2 you failed to appreciate that --

3 ANSWER: It could have had claims of
4 different scope, yes.

5 QUESTION: Could you please turn to the
6 last paragraph -- sorry -- last sentence of that same
7 paragraph?

8 Do you see where it says that
9 Mr. Moscovitch relied on your professional judgment?

10 ANSWER: Uh-huh.

11 QUESTION: Is that a yes?

12 ANSWER: Yes.

13 QUESTION: Mr. Moscovitch did rely on
14 your professional judgment, correct?

15 ANSWER: That's correct.

16 QUESTION: Could you please turn to
17 Paragraph 10?

18 You see, sir, that it says that
19 Mr. Moscovitch explained to Mr. Rolston, as he did to
20 you, that he wanted both horizontal, vertical, and --
21 angling towards each other?

22 ANSWER: I see that, yes. What about it?

23 QUESTION: You and Mr. Moscovitch did
24 have that discussion about angling towards each other,
25 correct?

1 ANSWER: It came up incidentally.

2 QUESTION: Have you been diagnosed as a
3 manic depressive?

4 ANSWER: Yes.

5 QUESTION: What are the symptoms of manic
6 depressive?

7 ANSWER: Mood swings up every now and
8 then.

9 | QUESTION: One of them is poor judgment?

10 ANSWER: Manic, there's a possibility of
11 poor judgment, yes.

12 QUESTION: Were you diagnosed with having
13 poor judgment as a result of your manic depressiveness?

14 | ANSWER: No.

15 QUESTION: There are also periods of
16 aggression and anger; is that right?

17 | ANSWER: Yes.

18 QUESTION: Did you have that?

19 | ANSWER: Yes.

20 QUESTION: But you didn't have any
21 episodes of poor judgment?

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22         ANSWER:  I have lots of episodes of poor
23 judgment.
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24 | (End of video clip.)

25 | MR. NELSON: And, Your Honor, may we pull

1 up, just for one issue that came up later, the
2 divisional notes that -- their notes that specifically
3 talk about the zoo?

4 Would you like to see those, or do you
5 have them in your possession?

6 THE COURT: Go ahead.

7 MR. NELSON: All right. Do we have
8 those, Matt?

9 The first one -- okay. The first one
10 you'll see, Your Honor, is from Dell's lawyer, Brian
11 Dietzel.

12 THE COURT: What exhibit number is this?

13 MR. NELSON: This is not an exhibit. We
14 can admit it, Your Honor.

15 THE COURT: All right. Mark it and make
16 it part of the record.

17 MR. NELSON: Let's go to the second page
18 of the interview notes, please.

19 Actually, let's see -- yeah. It's the
20 second page. It would be the next page.

21 Yeah. Right there.

22 And let's see, if he recalls meeting at
23 the zoo. A little bit above -- oh, let me clear that.

24 And it's about two-thirds of the way
25 down.

1 And, Your Honor, what I want you to --
2 actually, in that same thing, Your Honor, it says Claim
3 1 divisional -- Matt, can you highlight that?

4 Oh, you can't?

5 Okay. So I'll try to underline it.

6 Whoops. That's okay.

7 MR. TRIBBLE: We're going to have to
8 print those.

9 MR. NELSON: Claim 1 of divisional on the
10 booking, and then recalls running into J.M. at the zoo.

11 And then, Your Honor, let's see if we can
12 go down to the next interview notes, and those are notes
13 from Ergotron's counsel, Laura Friedemann, and you'll
14 see on -- I guess it's Page 6 of the PDF.

15 Try to -- I'm sorry. We need to -- go
16 back one -- go to Page 6 instead of 13, Matt, please.
17 And if you see -- and let's see, at the bottom, it says
18 explored divisional.

19 And then the next page -- whoops. It
20 says -- if we can clear that -- right there, Your Honor,
21 it says M.W. and talking about the zoo again.

22 And then the next page at the bottom, it
23 says with regard to the divisional being contemplated,
24 it talks about it right there.

25 And then the next page, please. Right

1 here you can see that they actually -- it says
2 contemplating getting divisional at metro zoo.

3 And this is -- of course, it's the same
4 meeting, so, you know, we're getting different -- but
5 every single lawyer on their side wrote that down, too.

6 And we'll skip down to Mr. Niederluecke's
7 notes of that same meeting. And we go down -- can we
8 zoom in on -- let's go -- a little more. Continue going
9 down. Right there.

10 And zoom in on J.M. instructed M.W. not
11 to file divisional application at zoo. And it also
12 talks about the divisional as well.

13 But those are the three lawyers, Your
14 Honor, two from Ergotron and one from Dell.

15 THE COURT: All right.

16 MR. NIEDERLUECKE: Your Honor, obviously,
17 with regard to whatever Mr. Waraksa said about the zoo
18 and the impeachment of the testimony, I understand that,
19 but I do want to address the extent that you have any
20 questions about the notes again as they bring them up.

21 What you saw in every one of those notes,
22 when they talked about the zoo or talked about a
23 divisional, it was always a divisional on booking, Your
24 Honor. And that's what was interesting. He kept
25 stopping on his highlighting. We have it up there right

1 now.

2 Every time, what you would see in there
3 is you would see it talked about booking divisional.
4 What Mr. Waraksa was telling us was that -- as I
5 explained to you earlier, that they got the notice of
6 allowance. They met.

7 Mr. Moscovitch brought up the idea that
8 there were these other products out there, and he was
9 concerned that nobody wanted his technology, and instead
10 they wanted -- he wanted to find out how he could cover
11 people's technology. And that's where the booking
12 expansion came to.

13 And in fact, what Mr. Waraksa was
14 explaining to us was that he met to discuss -- because
15 they hadn't decided what to do with this patent. It was
16 going to issue if they didn't do anything to continue it
17 or to -- in Canada, to divide it.

18 And so what he was talking about was,
19 what we were going to do about the booking divisional.
20 Do we want to file another patent to keep it going, or
21 do we want to complete this and say, no, we're done. We
22 know what we could get, and we're done.

23 And that's what that was about. And
24 that's why we had the issue previously that came up due
25 to your order and our misunderstanding in terms of our

1 ability to talk about booking but our inability to talk
2 about some other divisional.

3 To the extent that we talked about
4 booking there, it was always through the context of --
5 purely through the context of talking about this booking
6 patent that was issuing and whether or not they could
7 get broader scope of that claim for that booking patent.
8 And that was consistent with all those notes.

9 If you have any questions, I'm happy to
10 answer them, Your Honor.

11 THE COURT: Anything further?

12 MR. NELSON: Yeah.

13 First of all, Your Honor, move to admit
14 Plaintiff's Exhibit 1690, which is the notes of Dell
15 Attorney Brian Dietzel, the notes of 1691, which is the
16 notes of Ergotron's attorney, Laura Friedemann, and the
17 notes -- 1692, which are the notes of Ergotron attorney
18 Kurt Niederluecke at that meeting.

19 I will also say, Your Honor, the record
20 is clear on two occasions --

21 THE COURT: Just a moment.

22 Any objections?

23 MR. NIEDERLUECKE: No objection, Your
24 Honor.

25 THE COURT: Be admitted.

1 MR. NELSON: On two occasions, one of the
2 September hearings and again at the pretrial conference,
3 both Ms. Friedemann and Mr. Niederluecke, without our
4 having seen the notes -- I think the quote will be
5 exactly -- they said, Let me be clear. We did not talk
6 about divisionals. That is, obviously, not true.

7 MR. NIEDERLUECKE: Your Honor, I wasn't
8 even at that, so I'm not sure why he represents that I
9 made statements at that hearing.

10 MR. NELSON: Well, I think the record
11 will reflect that on the October 23rd pretrial
12 conference, you said, Let me be clear. We did not talk
13 about divisionals.

14 THE COURT: All right. What else?
15 All right.

16 MR. REED: Your Honor, I would just like
17 to make it clear, with respect to the equitable issues
18 on behalf of Dell, the clips that we have provided to
19 the Plaintiff's graphics people and that will be
20 provided to you on DVD, I understand, include very short
21 snippets from the testimony of each of the following
22 witnesses: Susan Friedlander Calzone, Ray Wilk, Shala
23 Stevenson, Volume 2 and Volume 6 of the deposition of
24 Jerry Moscovitch, Amit Mathradas, Edward Duffy, and Eric
25 Stageman.

1 And in addition, there is one clip that
2 we do have a CD for -- or DVD that is from the
3 deposition of Dr. Akin, the Plaintiff's technical
4 expert, that goes to the question, again, of
5 indefiniteness.

6 THE COURT: Okay. How long is the total
7 of all those clips?

8 MR. REED: All those together are just
9 under 17 minutes.

10 THE COURT: All right. Okay. All right.

11 MR. REED: Would you prefer to hear them
12 here now or --

13 THE COURT: I may.

14 Let me inquire, Mr. Niederluecke, this
15 book that you have handed me, now, other than what's
16 already been presented to me, what are you offering out
17 of this book?

18 MR. NIEDERLUECKE: Out of that book, Your
19 Honor, that has all that you've seen today. The only
20 two in that book that are necessary that you haven't
21 seen are the Waraksa and the Elchuk highlighted
22 deposition designations.

23 THE COURT: All right. And so I don't
24 need Duffy, right?

25 MR. NIEDERLUECKE: Right. You can take

1 everything out but those two, if you'd like, Your Honor.
2 That was just a book of all the testimony to date.

3 THE COURT: And with regard to Elchuk,
4 the parts you are offering is that highlighted in
5 yellow; is that correct?

6 MR. NIEDERLUECKE: That's correct, Your
7 Honor. And that includes the completeness designations
8 that the Plaintiffs have made.

9 THE COURT: And you're not offering
10 anything with -- with respect to Roarty, right?

11 MR. NIEDERLUECKE: I've already read
12 Roarty into the record, Your Honor, yes.

13 THE COURT: And then you've got Waraksa,
14 which, again, it's the highlighted yellow part?

15 MR. NIEDERLUECKE: Yes, sir.

16 THE COURT: And then you've got Alan
17 Tameshtit?

18 MR. NIEDERLUECKE: Tameshtit, yes, and
19 you saw his video, so you can take those out as well.

20 THE COURT: And then I've just got a
21 bunch of exhibits here.

22 MR. NIEDERLUECKE: Yeah. Those are the
23 exhibits to the depositions.

24 THE COURT: Are these already introduced
25 into evidence?

1 MR. NIEDERLUECKE: They are, Your Honor.

2 THE COURT: And then is that going to
3 complete all of your proof?

4 MR. NIEDERLUECKE: Yes, Your Honor.

5 THE COURT: All right. And does --

6 MR. NIEDERLUECKE: With the reservation
7 that we would like to put in a trial brief to supplement
8 your --

9 THE COURT: All right. And does Dell
10 have any additional proof they wish to offer?

11 MR. REED: Those would be the seven or
12 eight clips that total just under 17 minutes, Your
13 Honor.

14 THE COURT: All right.

15 MR. NELSON: And, Your Honor, may we move
16 the admission that was played on Mr. Waraksa, the
17 complaint -- I think it was Plaintiff's Exhibit 400 and
18 401. May those be admitted into evidence? I'm not sure
19 if they had actually been admitted yet.

20 THE COURT: All right. Is there any
21 objection?

22 MR. NIEDERLUECKE: No objection, Your
23 Honor.

24 THE COURT: All right. Be admitted.

25 It does not appear to me that there's a

1 whole lot here. Why don't you go ahead and just read in
2 this part with regard to what Waraksa and -- the other
3 witness that you wanted to offer.

4 MR. NIEDERLUECKE: Certainly, Your Honor.

5 THE COURT: I'd rather just have a clean
6 record of exactly what's before me than a lot of
7 filings.

8 MR. NIEDERLUECKE: Would you like --

9 THE COURT: And if you can get Dell's, I
10 may want to just listen to it, too. I don't know how
11 long that's going to be.

12 MR. REED: It's ready to go. We can
13 start it right now, Your Honor.

14 THE COURT: Okay. Well, let me hear this
15 one first.

16 MR. NIEDERLUECKE: You just want me to
17 read it? You don't want any role playing, I presume?

18 THE COURT: That's fine. You can just
19 read it.

20 MR. NIEDERLUECKE: Okay. And would you
21 like me to identify the pages as I read or --

22 THE COURT: Yes, that would be good or
23 just where you start.

24 MR. NIEDERLUECKE: Okay. This is the
25 deposition of Mark Elchuk dated May 22nd, 2008.

1 Starting on Page 5, Line 15:

2 QUESTION: Can you please state and spell
3 your full name for the record?

4 ANSWER: Mark, M-A-R-K, Douglas Elchuk,
5 E-L-C-H-U-K.

6 MR. NIEDERLUECKE: Page 6, Line 9.

7 QUESTION: Mr. Elchuk, do you recall when
8 Mr. Moscovitch retained your firm?

9 ANSWER: Generally, yes, I do.

10 QUESTION: Can you estimate a date or a
11 year?

12 ANSWER: That would have been just prior
13 to us beginning work on the reissue application that we
14 obtained for him.

15 QUESTION: And that was the purpose of
16 his retaining your firm for the reissue application for
17 the '978 patent?

18 ANSWER: Yes.

19 MR. NIEDERLUECKE: Page 8, Line 20.

20 QUESTION: Do you recall whether you
21 performed a patent search to help determine the scope of
22 the claims available?

23 ANSWER: No, we did not.

24 QUESTION: When determining the scope --

25 MR. NIEDERLUECKE: I'm sorry. I'm on

1 Page 9 now, Line 25.

2 QUESTION: When determining the scope of
3 the claims available, what prior art did you review with
4 Mr. Moscovitch?

5 ANSWER: To the best of my recollection,
6 the only art that we would have reviewed was whatever
7 art was presented to us from Mr. Moscovitch.

8 MR. NIEDERLUECKE: Page 12, Line 6.

9 QUESTION: Was this particular
10 declaration, the one that's signed and dated on October
11 1, 1998, was this submitted with Mr. Moscovitch's
12 reissue application?

13 ANSWER: Yes, I believe it was.

14 QUESTION: And was this declaration the
15 primary support for Mr. Moscovitch's reissue
16 application?

17 ANSWER: Yes.

18 MR. NIEDERLUECKE: And go to Page 29,
19 Line 14.

20 QUESTION: Mr. Elchuk, you've just been
21 handed what's marked as Elchuk 10. This is a copy of
22 the '235 patent, correct?

23 ANSWER: Yes.

24 QUESTION: We're going to turn back to
25 the file history, Exhibit 2. If you turn to the page

1 marked DEL041924, this is the third page of an office
2 action summary beginning on Page DEL041922, correct?

3 ANSWER: I'm sorry?

4 QUESTION: If you turn to DEL014 --
5 041922 --

6 ANSWER: Yes. Okay.

7 QUESTION: -- if you look under where it
8 says claim rejections, examiner initially rejected Claim
9 16 of the reissue patent as being anticipated by the
10 '235 patent, correct?

11 ANSWER: Yes.

12 QUESTION: Still in Exhibit 2, if you
13 turn to the page marked DEL041933, is this the amendment
14 in response to the office action beginning on page
15 DEL041922?

16 ANSWER: Yes, it appears to be.

17 QUESTION: In the third sentence --
18 actually, the second sentence after these limitations
19 are shown states there is no disclosure or suggestion
20 that the two displays are capable of being angled about
21 a vertical axis or towards each other, correct?

22 ANSWER: Yes.

23 QUESTION: So you distinguish the
24 invention claimed in the '235 patent from the invention
25 claimed in Mr. Moscovitch's reissue application on the

1 basis that the two displays in Mr. Moscovitch's
2 invention are capable of being angled about a vertical
3 axis or towards each other, correct?

4 ANSWER: Yes.

5 QUESTION: In other words, you
6 distinguish the '235 patent because it did not show
7 booking, correct?

8 ANSWER: Yes.

9 QUESTION: Mr. Elchuk, you've been handed
10 what has been marked as Elchuk 11. Have you seen this
11 document before?

12 ANSWER: I do not believe that I have.

13 QUESTION: This is United States Patent
14 No. 5,076,524, correct?

15 ANSWER: Yes.

16 QUESTION: It was filed on December 27,
17 1990, correct?

18 ANSWER: Yes.

19 QUESTION: The date of the patent is
20 December 31, 1991, correct?

21 ANSWER: Yes.

22 QUESTION: Turn back to Exhibit 10 for a
23 minute, which is the '235 patent. If you compare the
24 '235 patent with the '524 patent, it has the same two
25 inventors, correct?

1 ANSWER: Yes.

2 MR. NIEDERLUECKE: On Page 34, Line 14.

3 QUESTION: Mr. Elchuk, could you turn to
4 the page marked DEL041829? If you look at Figure 3,
5 Figure 3 shows the monitors facing towards one another,
6 correct?

7 ANSWER: I believe that's correct.

8 QUESTION: If you look down at Figure 4,
9 Figure 4 shows them being rotated or on a wide axis,
10 correct?

11 ANSWER: Yes.

12 QUESTION: And I think you testified
13 earlier that you distinguish Mr. Moscovitch's reissue
14 application from the '235 patent on the basis that the
15 displays in Mr. Moscovitch's invention are capable of
16 being angled about a vertical axis or towards one
17 another, correct?

18 ANSWER: Yes.

19 QUESTION: And I believe that you just
20 testified that the figures in the '524 patent show the
21 monitors being angled towards one another and rotating
22 about a vertical axis, correct?

23 ANSWER: They appear to rotate about
24 separate vertical axes.

25 QUESTION: After your brief review of the

1 '524 patent, is it your opinion that it shows that the
2 monitors are capable of booking?

3 ANSWER: I cannot say that they're
4 capable of showing booking, as I believe we've claimed
5 in the reissue patent.

6 My recollection was that we were reciting
7 a support arm that supported the two displays and that
8 the displays could be angled about the support arm. But
9 this appears to show two separate support arms about
10 which each of the displays can be rotated.

11 QUESTION: And you testified earlier that
12 you had never seen the '524 patent before today,
13 correct?

14 ANSWER: Yes.

15 QUESTION: And the '524 patent was not
16 disclosed to the patent examiner, correct?

17 ANSWER: Correct.

18 QUESTION: Do you agree that the '524
19 patent would have been material to the examination of
20 Mr. Moscovitch's reissue application?

21 ANSWER: Yes.

22 QUESTION: Would you have disclosed the
23 '524 patent to the Patent Office if you had been aware
24 of it?

25 ANSWER: Yes.

1 MR. NIEDERLUECKE: Now on Page 38.

2 QUESTION: So at least as of your e-mail
3 dated April 21, 1999, you were aware that Mass had done
4 work for Bloomberg, correct?

5 ANSWER: Yes.

6 QUESTION: You are aware that work
7 involved in the construction --

8 MR. NIEDERLUECKE: I'm sorry. Let me
9 reread that question.

10 QUESTION: You were aware that that work
11 involved the construction of dual display screens,
12 correct?

13 ANSWER: Yes.

14 MR. NIEDERLUECKE: On Page 43.

15 QUESTION: Yes. Mass had a sample of the
16 Bloomberg flat panel. This is their sample, photos of
17 it, since we don't have it here to look at. Have you
18 had a chance to review the photos?

19 ANSWER: Yes, I have.

20 QUESTION: If you turn to the sixth page,
21 do you agree that the photo shows the two monitors being
22 angled towards one another?

23 ANSWER: Yes.

24 QUESTION: If you turn to the next page,
25 you can see that the monitors are supported by a single

1 support arm, correct?

2 ANSWER: Yes. They do appear to be
3 supported by a single support arm.

4 QUESTION: Would you agree that the
5 previous photo shows booking?

6 ANSWER: Yes, I would have to agree.

7 QUESTION: Based on those facts, would
8 you consider the Bloomberg flat panel to be material to
9 the examination of Mr. Moscovitch's reissue application?

10 ANSWER: This was actually prior art. By
11 that, I mean it was well-known before the filing of Mr.
12 Moscovitch's reissue application, and we would have
13 cited this to the Patent Office out of an abundance of
14 caution.

15 MR. NIEDERLUECKE: On Page 45.

16 QUESTION: If you had seen these photos,
17 would you have disclosed the Bloomberg flat panel to the
18 Patent Office?

19 ANSWER: Yes, as I said, assuming that
20 this had been produced and was publicly known before the
21 filing date of the original patent, because
22 Mr. Moscovitch was trying to obtain a reissue patent
23 for...

24 MR. NIEDERLUECKE: Page 46.

25 QUESTION: Turn back to Exhibit 14.

1 These were the series of three Bloomberg magazines dated
2 May 1994, November 1994, and December 1994 respectively,
3 correct?

4 ANSWER: Yes.

5 QUESTION: We looked for -- we looked at,
6 for example, the last page of the entire document, which
7 is an advertisement for the Bloomberg flat panel,
8 correct?

9 ANSWER: It appears to be correct.

10 QUESTION: And then underneath, it says,
11 Contact your Bloomberg representative, correct?

12 ANSWER: Yes.

13 QUESTION: If you turn back a few pages,
14 three, this particular magazine is dated December 1994,
15 correct?

16 ANSWER: Yes.

17 QUESTION: So it appears that as of
18 December 1994, Bloomberg was selling the Bloomberg flat
19 panel, correct?

20 ANSWER: That appears correct.

21 QUESTION: And I believe you testified
22 earlier that the date of the filing of the reissue
23 application was October 13th, 1998, correct? You can
24 refer back to Exhibit 2, if you'd like.

25 ANSWER: The filing date of the reissue

1 application appears to be October 13th, 1998.

2 QUESTION: So Bloomberg was selling the
3 Bloomberg flat panel prior to the time of the reissue
4 application, correct?

5 ANSWER: That appears to be the case.

6 QUESTION: And I believe you testified
7 earlier that if the Bloomberg flat panel had been
8 available publicly, that you would have cited it to the
9 Patent Office in an abundance of caution; is that
10 correct?

11 ANSWER: That is correct.

12 MR. NIEDERLUECKE: Page 55, Line 6.

13 QUESTION: In Exhibit 18, Mr. Waraksa
14 represents that he purposely omitted any claims to the
15 booking feature, correct?

16 ANSWER: I believe that's correct.

17 QUESTION: So according to Mr. Waraksa's
18 letter, Exhibit 18, he did not believe that the claims
19 of the '978 patent were unnecessarily limited, correct?

20 ANSWER: I believe that is what
21 Mr. Waraksa is saying in this letter.

22 QUESTION: And Mr. Waraksa also
23 represents that it was not inadvertent that he left out
24 the claims relating to booking, correct?

25 ANSWER: Yes, I believe that's what he is

1 explaining here.

2 QUESTION: Turning back to Exhibit 2
3 again, the file history, and if you turn to the page
4 marked DEL041980 -- and this is actually Page 3 of
5 Mr. Moscovitch's declaration, correct?

6 ANSWER: Yes.

7 QUESTION: And in Paragraph 6, the
8 declaration states, at the time of the filing and during
9 the prosecution of the '158 patent, neither I nor my
10 patent attorney, Mirek A. Waraksa, appreciated that the
11 existing claims of the '158 patent were unnecessarily
12 literally limited as noted above, correct?

13 ANSWER: Yes.

14 QUESTION: I think you testified earlier
15 that Mr. Waraksa's letter, Exhibit 18, he represents
16 that he purposely left out any claims relating to
17 booking, correct?

18 ANSWER: I believe that -- that's his --

19 MR. NIEDERLUECKE: Excuse me. Let me
20 reread that.

21 ANSWER: I believe that's his
22 representation, correct.

23 QUESTION: So at the time this
24 declaration was signed on February 10, 2000, the
25 statement that Mr. Waraksa did not appreciate that the

1 claims were unnecessarily literally limited is
2 incorrect, correct?

3 ANSWER: That appears to be correct.

4 MR. NIEDERLUECKE: On 57.

5 QUESTION -- this is at Line 25.

6 QUESTION: Did you obtain Mr. Rolston's
7 file?

8 ANSWER: No, I did not.

9 QUESTION: Did you obtain Mr. Waraksa's
10 file?

11 ANSWER: No, I did not.

12 QUESTION: Did you receive Mr. Waraksa's
13 or Mr. Rolston's file from Mr. Moscovitch?

14 ANSWER: Did I receive Mr. Rolston's from
15 Mr. Moscovitch?

16 QUESTION: Yes.

17 ANSWER: I don't believe we did.

18 QUESTION: Did you receive Mr. Waraksa's
19 file from Mr. Moscovitch?

20 ANSWER: I do not believe we did.

21 QUESTION: If you can turn to Paragraph
22 13, it states, The errors and omissions arose
23 inadvertently and without fraudulent or deceptive intent
24 on my part, correct?

25 ANSWER: Yes.

1 QUESTION: But according to Mr. Waraksa's
2 letter, Exhibit 18, the errors and omissions were not
3 inadvertent, correct?

4 ANSWER: That's what Mr. Waraksa appears
5 to be saying.

6 QUESTION: If you can turn to the page
7 marked DEL041985, do you recognize this document?

8 ANSWER: Yes. It is a supplemental oath
9 of Jerry Moscovitch that I submitted on March 16th of
10 2000.

11 QUESTION: It is your practice to explain
12 to inventors what is required under this oath?

13 ANSWER: Yes.

14 QUESTION: In your opinion, what is
15 required under this oath?

16 ANSWER: That the client be completely
17 truthful and understand that the statements being made
18 are accurate to the best of their knowledge.

19 QUESTION: In your opinion, are
20 Mr. Moscovitch's statements in his declaration true to
21 the best of his knowledge?

22 ANSWER: Well, based on what Mr. Waraksa
23 is saying, I'm not sure that I can say that that's true
24 to the best of Mr. -- Mr. Moscovitch's knowledge.

25 MR. NIEDERLUECKE: Now we're on Page 68,

1 Line 17.

2 QUESTION: I believe you testified that
3 your firm did not receive the files from Mr. Rolston or
4 Mr. Waraksa, correct?

5 ANSWER: That is my recollection.

6 MR. NIEDERLUECKE: And that is the end.

7 THE COURT: All right. Very well.

8 Any cross-designation or response?

9 MR. TRIBBLE: None, Your Honor.

10 THE COURT: Okay. All right. Does that
11 conclude all of Ergotron's --

12 MR. NIEDERLUECKE: We have Mirek
13 Waraksa's still left.

14 THE COURT: All right.

15 MR. NIEDERLUECKE: Do you want me to read
16 that in?

17 THE COURT: Yeah. Yeah. Go ahead.

18 MR. NIEDERLUECKE: Okay. And I now have
19 great sympathy for you when you read the jury
20 instructions.

21 THE COURT: How long do you think this
22 one is?

23 MR. NIEDERLUECKE: You know, Your Honor,
24 it looks significantly shorter.

25 THE COURT: Okay.

1 MR. NIEDERLUECKE: I bet it's certainly
2 not more than 10 minutes.

3 THE COURT: All right. Go ahead.

4 MR. NELSON: And a couple of notes
5 before -- you have our completeness designations with
6 that?

7 MR. NIEDERLUECKE: I believe they're in
8 here. That's what my understanding is. Why don't you
9 give me those just to make sure, but I believe they've
10 all been put in.

11 MR. TRIBBLE: I think there are some left
12 out of Elchuk.

13 MR. NELSON: Your Honor, we, again, would
14 like to note our objections on both Elchuk and Waraksa,
15 just to preserve them.

16 THE COURT: Where are your objections?

17 MR. NIEDERLUECKE: They should be in the
18 front of that --

19 THE COURT: I gave you the notebook back.

20 MR. NIEDERLUECKE: Oh. Do you actually
21 have the notebook? You gave me the two pages. You
22 might still have the notebook up there.

23 THE COURT: I don't believe so.

24 MR. NIEDERLUECKE: No?

25 THE COURT: I think Ms. -- Ms. Ferguson

1 has it right there.

2 MR. TRIBBLE: Your Honor, I have a copy
3 of our objections.

4 THE COURT: Okay. Why don't you just
5 file those. You want to mark them as an exhibit number
6 or something where we can --

7 MR. TRIBBLE: Yes. I'll mark them as
8 Plaintiff's Exhibit 1693.

9 THE COURT: All right.

10 MR. TRIBBLE: And for completeness, Your
11 Honor, I have these demonstratives that we've used with
12 Ms. Payfer during trial. Can I mark those as
13 Plaintiff's Exhibits 1694 and then submit smaller copies
14 for the Court later?

15 THE COURT: Yes, you may.

16 MR. TRIBBLE: Okay.

17 THE COURT: All right. Proceed.

18 MR. NIEDERLUECKE: This is the deposition
19 of Mirek Waraksa taken -- if I can find the date here --
20 on the 9th of June, 2008. Page 5, Line 5.

21 QUESTION: Mr. Waraksa --

22 MR. NIEDERLUECKE: It's actually Line 1.
23 I apologize. It's written a little differently here,
24 but Page 5, Line 1.

25 QUESTION: Mr. Waraksa, can you, for the

1 record, state your full name?

2 ANSWER: Full name is M-I-R-E-K, middle
3 initial A; last name is W-A-R-A-K-S-A.

4 QUESTION: Sure. What was the scope of
5 invention that Mr. Moscovitch was asking you to obtain
6 patent protection for?

7 ANSWER: Initially, he wanted to protect
8 the general concept of a dual display system. He
9 then -- but he did emphasize the rotary arm assembly,
10 the vertical/horizontal alignment option.

11 QUESTION: Mr. Waraksa, did
12 Mr. Moscovitch, in your initial meeting, ever identify a
13 booking feature as part of his invention?

14 ANSWER: No, he did not.

15 QUESTION: Mr. Waraksa, I'll have you
16 look on Exhibit 1 as well just for dates.

17 Is it correct that you filed a patent
18 application for Mr. Moscovitch on April 26th, 1996?

19 ANSWER: I believe that date is correct.
20 That is the date I filed for Mr. Moscovitch.

21 QUESTION: And at that time, you had not
22 conducted any patent or prior art searches relating to
23 this invention, correct?

24 ANSWER: That is correct.

25 QUESTION: And you had not had any

1 conversations with Mr. Moscovitch regarding prior art
2 other than your indication that dual display systems had
3 existed?

4 ANSWER: That is correct.

5 MR. NIEDERLUECKE: On Page 34, Line 3.

6 QUESTION: And so at the time you filed
7 this application, did Mr. Moscovitch provide any
8 indication of prior art dual display systems to you?

9 ANSWER: No, he did not.

10 QUESTION: Let me rephrase it.

11 Did you ask Jerry at any time about what
12 he might have known on prior art systems?

13 ANSWER: I wouldn't remember today
14 whether I specifically asked him that or not.

15 MR. NIEDERLUECKE: Page 37, Line 6.

16 QUESTION: Did you identify for
17 Mr. Moscovitch his duty to disclose information material
18 to the examination of the application?

19 ANSWER: Yes, I did.

20 QUESTION: Did Mr. Moscovitch review the
21 application prior to you filing it?

22 ANSWER: Yes, he did.

23 QUESTION: Did he make any objection to
24 you regarding the scope of the claims?

25 ANSWER: No.

1 QUESTION: Did he make any objection to
2 you regarding anything about the application that he
3 reviewed?

4 ANSWER: No.

5 QUESTION: At the time the application
6 for the '939 patent was filed, had Mr. Moscovitch
7 described for you any commercial activities that he was
8 involved in regarding the dual display systems?

9 ANSWER: He advised me he was consulting
10 with a client in the U.S. regarding the product.

11 QUESTION: Did he provide any further
12 information?

13 ANSWER: Nothing beyond that.

14 MR. NIEDERLUECKE: I'm on Page 39, Line
15 14.

16 QUESTION: So at the time you filed this
17 application, you were confident that you had properly
18 identified the scope of the invention that was intended
19 to be claimed?

20 ANSWER: I believe I had followed his --
21 Mr. Moscovitch's instructions, prepared the patent
22 application to cover exactly what he wanted.

23 QUESTION: Do you believe that you had
24 committed any error up to the time you filed the patent
25 application?

1 ANSWER: No.

2 MR. NIEDERLUECKE: And that was Page 57,
3 Line 18.

4 QUESTION: Had Mr. Moscovitch ever
5 directed you to obtain coverage specifically to a
6 booking feature?

7 ANSWER: No.

8 QUESTION: For the invention disclosed in
9 the '939?

10 ANSWER: No, he did not.

11 MR. NIEDERLUECKE: Page 62, Line 4.

12 QUESTION: Do you recall what Mr. Rolston
13 was asking you to do?

14 ANSWER: He wanted me to swear an
15 affidavit that I had made a mistake in drafting the
16 original patent application, that it misrepresented the
17 scope of the invention to be protected.

18 QUESTION: Did you sign such an
19 affidavit?

20 ANSWER: No, I did not, because that
21 wasn't true.

22 QUESTION: Why wasn't that true?

23 ANSWER: Because I had followed
24 instructions specifically. I had never been told about
25 the booking concept until well after the notice of

1 allowance issued in the case. And I understood the
2 affidavit, the reissue affidavit, was going to be based
3 on the fact that the error had occurred from day one.

4 MR. NIEDERLUECKE: Page 75, Line 8.

5 QUESTION: I will represent this is a
6 declaration of Jerry Moscovitch that has been provided
7 by Mass in this litigation, and I will represent to you
8 that this is the declaration that Mr. Moscovitch filed
9 with the United States Patent & Trademark Office as part
10 of the reissued application.

11 ANSWER: Is there nothing missing here
12 between 14 and 15?

13 QUESTION: In what was filed with the
14 Patent Office, you will note that -- well, I believe
15 there is a sentence that is not on the top or the bottom
16 of one of these pages.

17 But once you've had a chance to just look
18 at it, I would like to walk you through a few areas and
19 ask you your understanding based on some factual
20 statements.

21 ANSWER: Yes.

22 MR. NIEDERLUECKE: Page 81, Line 23.

23 QUESTION: The first sentence of
24 Paragraph 6 states, quote, at the time of filing and
25 during the prosecution of the '158 application, neither

1 I nor my patent attorney, Mirek A. Waraksa, appreciated
2 that the existing claim of the '158 application were
3 unnecessarily literally limited as noted above.

4 Do you see that statement?

5 ANSWER: Yes.

6 QUESTION: Is that a true statement?

7 ANSWER: It is difficult to characterize
8 that as true or false. I felt that the claims I drafted
9 aptly covered the invention that Mr. Moscovitch wanted
10 to protect.

11 So I don't think the statement is
12 technically true, but I was certainly unaware of
13 anything that would have limited the scope of
14 protection.

15 QUESTION: In the last sentence of
16 Paragraph 6, Mr. Moscovitch states, quote, I relied on
17 Mr. Waraksa's professional judgment that a claim of the
18 scope as claimed, parenthetical, that should be 16,
19 actually; it is a typo, end parenthetical, above was not
20 patentable in view of the prior art that Mr. Waraksa and
21 I reviewed prior to preparing and filing the '158
22 application, end quote.

23 Do you see that sentence?

24 ANSWER: Yes, I do.

25 QUESTION: Is that a true sentence?

1 ANSWER: No. We didn't do any prior art
2 searches.

3 QUESTION: Prior to filing and preparing
4 the '158 application, did you review with Mr. Moscovitch
5 any prior art?

6 ANSWER: Nothing beyond what I knew about
7 Apple's product.

8 QUESTION: So it is your understanding,
9 based on your involvement of the prosecution, that the
10 last sentence in Paragraph 6 is false?

11 ANSWER: That is false. We never did
12 that assessment.

13 | QUESTION: If you turn to Paragraph 10 --

14 ANSWER: Yes.

15 QUESTION: -- is Mr. Moscovitch's
16 statement to the Patent Office that he had initially
17 explained to you that he was seeking a patent covering
18 the two displays that could be adjusted themselves
19 relative to the support such that they were angled
20 towards each other?

21 | ANSWER: No.

22 QUESTION: So this statement in Paragraph
23 10, to that extent, would be false?

24 ANSWER: Yes.

25 | QUESTION: If you could turn to Paragraph

1 13, Mr. Moscovitch states that, quote, the errors and
2 omissions arose inadvertently without fraudulent or
3 deceptive intent on his part, end quote.

4 Do you see that?

5 ANSWER: Yes.

6 QUESTION: Is that a true or false
7 statement?

8 ANSWER: It is not entirely true.

9 MR. NIEDERLUECKE: Page 85, Line 20.

10 QUESTION: I am going to show you a
11 document that has been previously marked as Moscovitch
12 Exhibit 14.

13 Mr. Moscovitch, have you ever seen this
14 document before?

15 ANSWER: No, I have not.

16 QUESTION: Do you know what Exhibit 14
17 shows?

18 ANSWER: A dual display system.

19 QUESTION: Did Mr. Moscovitch ever
20 disclose to you anything regarding the dual display
21 system illustrated in Moscovitch Exhibit 14?

22 ANSWER: No, he did not.

23 QUESTION: Had you been aware, at the
24 time you were prosecuting the '939 patent application,
25 that such a design was in existence more than a year

1 prior to the application, would you have disclosed this
2 to the Patent Office?

3 ANSWER: Yes, I would have.

4 QUESTION: Would you have considered this
5 to be material to the patentability of the '939
6 invention?

7 ANSWER: Yes, I would have.

8 QUESTION: For your benefit, I will
9 represent to you that these are photographs of a sample
10 that had been provided by Mass in this case. These are
11 actual photographs that we took upon examination of the
12 sample.

13 First of all, you discussed seeing a
14 product when you initially were meeting with or during
15 the process of meeting with Mr. Moscovitch for applying
16 for his invention. Was this the product that you were
17 shown?

18 ANSWER: No.

19 QUESTION: Have you ever seen this
20 product prior to today?

21 ANSWER: No, I have not.

22 QUESTION: Had Mr. Moscovitch shown you
23 this sample during the prosecution of the '939 patent,
24 would you have disclosed this to the Patent Office?

25 ANSWER: Yes, I would have.

1 QUESTION: Based upon these photographs,
2 do you believe that this product shown in Exhibit 12
3 would have been material to the prosecution of the '939
4 application?

5 ANSWER: Yes, I do.

6 MR. NIEDERLUECKE: Page 89, Line 20.

7 QUESTION: And again, as you look through
8 here, I will represent to you that these are excerpts
9 from a Bloomberg magazine dated May 1994, November 1994,
10 and December 1994.

11 ANSWER: December '94 was the last date?

12 QUESTION: Yes. And I'll represent that
13 in each of these, you will see in each article that
14 there is a page disclosing a display system. Have you
15 ever seen these Bloomberg magazines, these particular
16 magazines?

17 ANSWER: No, I have never seen these.

18 QUESTION: So Mr. Moscovitch never
19 disclosed to you any of the advertisements shown in
20 these magazines?

21 ANSWER: No, he did not.

22 QUESTION: Based upon your review today,
23 had Mr. Moscovitch disclosed these advertisements to
24 you, would you have disclosed them to the United States
25 Patent Office?

1 ANSWER: I very likely would have.

2 MR. NIEDERLUECKE: Now Page 91 -- and I
3 think we're almost done. Page 91, Line 22.

4 QUESTION: So if you or Mr. Moscovitch
5 didn't provide this information to the Patent Office, is
6 there any way that the Patent Office would learn of the
7 commercial activity?

8 ANSWER: No.

9 QUESTION: Mr. Moscovitch (sic), I have
10 given you what has been marked as Exhibit 14.

11 Have you ever seen Exhibit 14 before?

12 ANSWER: No, I never have.

13 QUESTION: Mr. Moscovitch never showed
14 you any drawings similar to this?

15 ANSWER: Nothing comparable to this.

16 QUESTION: Had he provided you this type
17 of information, what would you have done?

18 ANSWER: I would have considered
19 disclosing it to the U.S. Patent Office.

20 MR. NIEDERLUECKE: Page 93, Line 11.

21 QUESTION: So when you disclosed to
22 Mr. Moscovitch about two Apple computer CRTs sitting on
23 a table, he made no reference to you whatsoever about a
24 dual display system shown in Exhibit 14?

25 ANSWER: No, he did not.

1 QUESTION: Based upon your review of
2 these exhibits we have just been looking at, do you
3 think Mr. Moscovitch was being forthright with you
4 regarding his knowledge?

5 ANSWER: No. I think he withheld a fair
6 bit from me.

7 MR. NIEDERLUECKE: Page 95, Line 3.

8 QUESTION: Did Mr. Moscovitch disclose to
9 you any purchase orders for dual LCD systems?

10 ANSWER: No, he did not.

11 QUESTION: Had you been aware of purchase
12 orders of the system identified in the photographs as
13 Exhibit 12 --

14 ANSWER: Yes.

15 QUESTION: -- would you have disclosed
16 that to the Patent Office?

17 ANSWER: Yes, I would have.

18 MR. NIEDERLUECKE: Page 115.

19 QUESTION: And finally, I know there have
20 been certain statements made in Mr. Moscovitch's letters
21 and declarations regarding your health problems.

22 Do you recall those?

23 ANSWER: Yes, I do.

24 QUESTION: Did any of your health
25 problems inhibit your ability to properly prosecute the

1 '939 application?

2 ANSWER: No, nothing did.

3 QUESTION: Did any of your -- did any of
4 your health problems affect your ability to fully comply
5 with the requests of Mr. Moscovitch?

6 ANSWER: Nothing.

7 MR. NIEDERLUECKE: And that is the end of
8 Mirek Waraksa's deposition.

9 THE COURT: Thank you.

10 Anything other than what Plaintiffs have
11 already offered?

12 MR. TRIBBLE: No. We've played our
13 designations, but I do have this Plaintiff's Exhibit
14 1693, our objections to Elchuk and Waraksa and just --
15 I'm putting a sticker on them for these large boards
16 that were used with Ms. Payfer during the jury trial and
17 the first page, which was used today, to show the
18 printout of the different times and the other Bloomberg
19 articles. I'm going to substitute out a small copy of
20 these.

21 THE COURT: All right. Very well.

22 Does Ergotron have any further evidence
23 it wishes to offer with regard to the equitable issues?

24 MR. NIEDERLUECKE: No, Your Honor. Thank
25 you.

1 THE COURT: All right. Dell?

2 MR. REED: Would you prefer us to go
3 ahead and play the clips that we have today?

4 THE COURT: This is a 17-minute clip, you
5 say?

6 MR. REED: It's actually about seven or
7 eight different clips, the longest of which is 5
8 minutes, but the time for all of them together is just
9 under 17 minutes.

10 THE COURT: Okay.

11 MR. TRIBBLE: And we have that burned to
12 a DVD, if you'd like it, Your Honor.

13 THE COURT: Okay. Why don't you let me
14 have the DV -- can I play that in my CD player in my
15 car?

16 MR. REED: I don't believe so, Your
17 Honor.

18 THE COURT: Have to play it on the
19 computer?

20 MR. REED: A computer or a DVD player.

21 THE COURT: Okay. All right. Yeah. Why
22 don't you let me just have that, and I'll listen to
23 that.

24 It's about five minutes until 12:00 --
25 well, excuse me. Does that complete your offer?

1 MR. REED: We actually have one disk, one
2 clip, and then I believe that the Plaintiffs prepared
3 for us -- thank you -- a second disk with the other
4 clips.

5 THE COURT: All right. If you'll hand
6 those up to Ms. Ferguson and mark those as a Defendants'
7 exhibit, if you would.

8 MR. TYLER: And, Your Honor, may I
9 suggest that we'll discuss a schedule for a trial brief?

10 THE COURT: Yes. Okay. I'll get to that
11 in a minute. Let me get this evidence in.

12 Mark those as Defendants' exhibits and
13 attach them.

14 And do you have the designations for
15 those that you can give to the court reporter?

16 MR. REED: Yes, Your Honor.

17 THE COURT: All right. And do you have a
18 hard copy you can give to the court reporter of that?

19 MR. REED: Yes.

20 THE COURT: Okay. Why don't -- give that
21 to her, and she can attach that or substitute it in.
22 Does that complete all of -- is there any objection to
23 that offer by Dell?

24 MR. TRIBBLE: No objection, Your Honor.

25 THE COURT: Okay. And those are exhibit

1 numbers what?

2 MR. REED: These are the depo
3 testimony that's --

4 THE COURT: Okay. Do you have those
5 marked or --

6 MR. REED: We can mark those if you want
7 them marked. It's also what's on the disk.

8 THE COURT: Okay.

9 MR. REED: And the disk is marked --

10 THE COURT: Why don't you mark that
11 composite as one exhibit and then the disk as two other
12 exhibits.

13 MR. REED: Okay. The composite paper
14 copy of the transcripts is marked as Defendant's Exhibit
15 1474.

16 THE COURT: All right.

17 MR. REED: One of the CDs that we're
18 submitting that has the deposition testimony of Dr. Akin
19 is Defendant's Exhibit 1472.

20 THE COURT: Okay.

21 MR. REED: And the other CD that has the
22 compilations of all of the other witnesses that I listed
23 before is Defendant's Exhibit 1473.

24 THE COURT: Okay. All right. Those are
25 admitted.

1 All right. Any other evidence from Dell?

2 Any other evidence from Dell?

3 MR. TYLER: No, Your Honor.

4 THE COURT: All right. Any other
5 evidence from Plaintiffs?

6 MR. TRIBBLE: None, Your Honor.

7 THE COURT: All right. The record's
8 closed. That's all the evidence, right?

9 MR. TRIBBLE: Correct.

10 THE COURT: Speak now or forever --
11 whatever.

12 Okay. It's about 12:00. I'm going to
13 have to take off for Tyler for a hearing that I have
14 over there. The -- if the jury doesn't come in before I
15 leave, as we had discussed, Magistrate Judge Everingham
16 will handle it from there on with the agreement of the
17 parties.

18 And also do I have your agreement for him
19 to handle any jury notes that may come out?

20 MR. TRIBBLE: Yes, Your Honor.

21 MR. NIEDERLUECKE: Yes, Your Honor.

22 THE COURT: Mr. Tyler, do you agree?

23 MR. TYLER: I do, yes, sir.

24 THE COURT: All right. Very well.

25 Now, let me -- I don't know what the

1 verdict in this case is going to be. Y'all are going to
2 meet and confer with regard to a briefing schedule for
3 your equitable issues.

4 I'd like for you to also include in that
5 meet and confer a briefing schedule for all of your post
6 verdict motions, however it comes out.

7 My desire is to move on toward entry of a
8 final judgment in this case, again, regardless of how it
9 comes out, very promptly.

10 I've had cases that I've tried that once
11 this gravy gets cold, it's real hard to swallow later
12 on, and I just want to get it dealt with. It's hard
13 enough the first time when it's hot, but it really gets
14 hard if we start letting it slide and other things get
15 put in front of it, and then it goes to a month and two
16 months and six months and longer.

17 So try to give me a briefing schedule
18 that will get everything to me where we can have a
19 hearing within 30 days, 45 days at the most to where we
20 can have a hearing, I can hear it, and we can get to a
21 final judgment stage, okay?

22 All right. Thank y'all. I enjoyed
23 trying the case with you, and good luck to both of you.

24 We're adjourned.

25 MR. NIEDERLUECKE: Thank you.

1 MR. TRIBBLE: Thank you.

2 COURT SECURITY OFFICER: All rise.

3 (Recess.)

4 * * * * *

5

6 CERTIFICATION

7

8 I HEREBY CERTIFY that the foregoing is a
9 true and correct transcript from the stenographic notes
10 of the proceedings in the above-entitled matter to the
11 best of my ability.

12

13

14

15 /s/_____
16 SUSAN SIMMONS, CSR
17 Official Court Reporter
State of Texas No.: 267
Expiration Date: 12/31/08

Date

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20 /s/_____
21 JUDITH WERLINGER, CSR
22 Deputy Official Court Reporter
State of Texas No.: 731
Expiration Date 12/31/08

Date

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